Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

HARVARD LAW LIBRARY

Received MAY 26 1917

REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO SEPTEMBER 19, 1916, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.

VOL. CC

A. D. 1917.

LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, JULY 20, 1916.
THIRD DISTRICT, OCTOBER 13, 1915.
FOURTH DISTRICT, AUGUST 10, 1916.

EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

CHICAGO
CALLAGHAN & COMPANY
1917

Copyright, 1917
BY CALLAGHAN & COMPANY

MAY 26 1917

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO MARCH 1, 1917.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.
Second District—WILLIAM M. FARMER.....Vandalia.
Third District—FRANK K. DUNN.....Charleston.
Fourth District—GEORGE A. COOKE.....Aledo.
Fifth District—CHARLES C. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURELY, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JESSE HOLDOM, Justice, Michigan Blvd. Bldg., Chicago.

WILLIAM E. DEVER, Justice, Michigan Blvd. Bldg., Chicago.

FIRST BRANCH*

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN P. MCGOORTY, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. MCDONALD, Justice, Michigan Blvd. Bldg., Chicago.

SECOND BRANCH**

JOHN M. O'CONNOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

CLARENCE N. GOODWIN, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

EDGAR ELDREDGE, Presiding Justice, Ottawa.

EMERY C. GRAVES, Justice, Geneseo.

GEORGE W. THOMPSON, Justice, Galesburg.

---

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. ¶ 2981.

** Established under act of June 6, 1911, J. & A. ¶ 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.
JAMES C. MCBRIDE, Justice, Taylorville.
FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.
DEWITT T. HARTWELL, Marion.
WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: J. C. EAGLETON, Robinson.
JULIUS C. KERN, Carmi.
CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.
GEORGE A. CROW, East St. Louis.
J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.
JAMES C. MCBRIDE, Taylorville.
THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.
WALTER BREWER, Toledo.
AUGUSTUS A. PARTLOW, Danville.

* Laws 1897, 188, J. & A. § 3070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.
ELBERT S. SMITH, Springfield.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
FRANK L. HOOPER, Watseka.
ARTHUR W. DESELM, Kankakee.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.
Judges: FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.
WILLIAM T. CHURCH, Aledo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.
Judges: JAMES S. BAUME, Galena.
RICHARD S. FARRAND, Dixon.
OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.
Judges: CLINTON F. IRWIN, Elgin.
DUANE J. CARNES, Sycamore.
MAZZINI SLUSSER, Wheaton.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.
Judges: ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—Frank J. Walsh, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—August W. Miller, County Building, Chicago.

JUDGES.

RICHARD S. TUTHILL,	DAVID F. MATCHETT,
JESSE A. BALDWIN,	JOHN GIBBONS,*
ROBERT E. CROWE,	LOCKWOOD HONORE,
KICKHAM SCANLAN,	GEORGE KERSTEN,
THOMAS G. WINDES,	JOHN P. MCGOORTY,
MERRITT W. PINCKNEY,	FREDERICK A. SMITH,
JESSE HOLDOM,	CHARLES M. WALKER,
VICTOR P. ARNOLD,	GEO. F. BARRETT,
DAVID M. BROTHERS,	THOMAS TAYLOR, JR.,
CHAS. M. THOMSON,	OSCAR M. TORRISON.

* Died February 11, 1917.

SUPERIOR COURT.

CLERK—JOHN KJELLANDER, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
JOSEPH SABATH,
JOSEPH B. DAVID,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. MCDONALD,
MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
JOHN J. SULLIVAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

L. D. YAGER, Judge. ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. J. W. GREENAWAY, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge. JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge. LORAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge. A. C. SHEPLEY, Clerk.

THE CITY COURT OF CARBONDALE.

HERBERT A. HAYS, Judge. DALLAS MEISENHEIMER, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge. GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge. CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. MCEWEN, Judge. JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge. HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

H. L. BROWNING,
W. M. VANDEVENTER, Judges. WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge. A. N. HOMAN, Clerk.

THE CITY COURT OF HARRISBURG.

W. W. DAMRON, Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. ANNA REED, Clerk.

THE CITY COURT OF JOHNSTON CITY.

J. H. CLAYTON, Judge. J. E. SULLINS, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. MRS. LAURETTA SALZMANN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEORGE A. SCHRADER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM H. HAWTHORNE, Judge. PETER ROLANDE, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF WEST FRANKFORT.

H. R. DIAL, Judge. PEARL BEATTIE, Clerk.

THE CITY COURT OF ZION CITY.

V. V. Barnes, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. ¶ 3313 *et seq.*

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,
HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER	HUGH J. KEARNS	BERNARD P. BARASA
EDWARD T. WADE	JOSEPH S. LABUY	SAMUEL H. TRUDE
JOHN K. PRINDIVILLE	JOHN R. NEWCOMER	LEO DOYLE
JOSEPH P. RAFFERTY	JOHN R. CAVERLY	EDMUND K. JARECKI
JOHN COURTNEY	JOHN A. SWANSON	CHARLES N. GOODNOW
JOHN RICHARDSON	HUGH R. STEWART	DENNIS W. SULLIVAN
JOHN A. MAHONEY	HARRY P. DOLAN	SHERIDAN E. FRY
WILLIAM N. GEMMILL	JOHN F. HAAS	JOHN STELK
FRANK H. GRAHAM	HOWARD HAYES	JOSEPH Z. UHLIR
WELLS M. COOK	ARNOLD HEAP	HOSEA W. WELLS.

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermilion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES	COUNTIES	COUNTY SEATS
LYMAN MCCARL	Adams	Quincy.
MILES FREDERICK GILBERT	Alexander	Cairo.
WM. H. DAWDY	Bond	Greenville.
WM. C. DE WOLF	Boone	Belvidere.
WILLARD Y. BAKER	Brown	Mt. Sterling.
JAMES R. PRICHARD	Bureau	Princeton.
JOHN DAY, JR	Calhoun	Hardin.
ARTHUR J. GRAY	Carroll	Mt. Carroll.
CHARLES Æ. MARTIN	Cass	Virginia.
ROY C. FREEMAN	Champaign	Urbana.
CHARLES A. PRATER	Christian	Taylorville.
A. L. RUFFNER	Clark	Marshall.
JOHN L. BOYLES	Clay	Louisville.
JAMES ALLEN	Clinton	Carlyle.
JOHN P. HARRAH	Coles	Charleston.
THOMAS F. SCULLY	Cook	Chicago.
HENRY HORNER, Pro. J	Cook	Chicago.
DUANE GAINES	Crawford	Robinson.
STEPHEN B. RARIDEN	Cumberland	Toledo.
WILLIAM L. POND	DeKalb	Sycamore.
FREDERICK C. HILL	DeWitt	Clinton.
D. H. WAMSLEY	Douglas	Tuscola.
S. L. RATHJE	DuPage	Wheaton.
DANIEL V. DAYTON	Edgar	Paris.
PETER C. WALTERS	Edwards	Albion.
BARNEY OVERBECK	Effingham	Effingham.
JEROME G. WILLS	Fayette	Vandalia.
MALCOLM L. MCQUISTON	Ford	Paxton.
NEALY I. GLENN	Franklin	Benton.
HOBART S. BOYD	Fulton	Lewistown.
GEORGE L. HOUSTON	Gallatin	Shawneetown.
THOMAS HENSHAW	Greene	Carrollton.
GEORGE BEDFORD	Grundy	Morris.
J. S. SNEED	Hamilton	McLeansboro.
E. W. DUNHAM	Hancock	Carthage.
ARTHUR A. MILES	Hardin	Elizabethtown.
RUFUS F. ROBINSON	Henderson	Oquawka.
LEONARD E. TELLEEN	Henry	Cambridge.
JOHN H. GILLAN	Iroquois	Watseka.
WILLARD F. ELLIS	Jackson	Murphysboro.
HARRY C. DAVIDSON	Jasper	Newton.
ANDREW D. WEBB	Jefferson	Mt. Vernon.
HARRY W. POGUE*	Jersey	Jerseyville.
F. J. CAMPBELL	Jo Daviess	Galena.
J. F. HIGHT	Johnson	Vienna.
S. N. HOOVER	Kane	Geneva.
JOHN H. WILLIAMS, Pro. J	Kane	Geneva.
JAY H. MERRILL	Kankakee	Kankakee.
CLARENCE S. WILLIAMS	Kendall	Yorkville.
R. C. RICE	Knox	Galesburg.
PERRY L. PERSONS	Lake	Waukegan.
HENRY MAYO	La Salle	Ottawa.

* Died November 21, 1916.

JUDGES	COUNTIES	COUNTY SEATS
ALBERT T. LAEDIN, Pro. J.	La Salle	Ottawa.
O. W. LONGENECKER	Lawrence	Lawrenceville.
JOHN B. CRABTREE	Lee	Dixon.
B. R. THOMPSON	Livingston	Pontiac.
CHARLES J. GEHLBACH	Logan	Lincoln.
CHARLES I. IMES	McDonough	Macomb.
DAVID T. SMILEY	McHenry	Woodstock.
JAMES C. RILEY	McLean	Bloomington.
JOHN H. MCCOY	Macon	Decatur.
ANDREW J. DUGGAN	Macoupin	Carlinville.
H. B. EATON	Madison	Edwardsville.
GEO. W. CROSSMANN, Pro. J.	Madison	Edwardsville.
WILLIAM G. WILSON	Marion	Salem.
DANIEL H. GREGG	Marshall	Lacon.
JAMES A. MCCOMAS	Mason	Havana.
LANNES P. OAKES	Massac	Metropolis.
JESSE M. OTT	Menard	Petersburg.
FRIEND L. CHURCH	Mercer	Aledo.
HENRY SCHNEIDER	Monroe	Waterloo.
J. T. MCDAVID	Montgomery	Hillsboro.
WM. E. THOMSON	Morgan	Jacksonville.
JOHN T. GRIDER	Moultrie	Sullivan.
FRANK E. REED	Ogle	Oregon.
CHESTER F. BARNETT	Peoria	Peoria.
WALTER A. CLINCH, Pro. J.	Peoria	Peoria.
LOUIS R. KELLY	Perry	Pinckneyville.
WM. A. DOSS	Piatt	Monticello.
PAUL F. GROTE	Pike	Pittsfield.
B. F. ANDERSON	Pope	Golconda.
FRED HOOD	Pulaski	Mound City.
IRVING E. BROADDUS	Putnam	Hennepin.
WM. M. SCHUWERK	Randolph	Chester.
ROBT. B. WITCHER	Richland	Olney.
NELS A. LARSON	Rock Island	Rock Island.
BENJ. S. BELL, Pro. J.	Rock Island	Rock Island.
JOSEPH B. MESSICK	St. Clair	Belleville.
FRANK PERRIN, Pro. J.	St. Clair	Belleville.
CHAS. D. STILWELL	Saline	Harrisburg.
JOHN B. WEAVER	Sangamon	Springfield.
C. H. JENKINS, Pro. J.	Sangamon	Springfield.
JOHN C. WORK	Schuyler	Rushville.
F. C. FUNK	Scott	Winchester.
A. J. STEIDLEY	Shelby	Shelbyville.
FRANK THOMAS	Stark	Toulon.
ROSCOE J. CARNAHAN	Stephenson	Freeport.
JAMES M. RAHN	Tazewell	Pekin.
MONROE C. CRAWFORD	Union	Jonesboro.
LAWRENCE T. ALLEN	Vermilion	Danville.
W. J. BOOKWALTER, Pro. J.	Vermilion	Danville.
W. S. WILLHITE	Wabash	Mt. Carmel.
L. E. MURPHY	Warren	Monmouth.
W. P. GREEN	Washington	Nashville.
J. V. HEIDINGER	Wayne	Fairfield.
J. M. ENDICOTT	White	Carmi.
WM. A. BLODGETT	Whiteside	Morrison.
GEORGE J. COWING	Will	Joliet.
JOHN B. FITHIAN, Pro. J.	Will	Joliet.
W. F. SLATER	Williamson	Marion.
LOUIS M. RECKHOW	Winnebago	Rockford.
ARTHUR C. FORT	Woodford	Eureka.

CASES IN THIS VOLUME IN WHICH CERTIORARI HAS BEEN DENIED:

The following table shows the Appellate Court cases reported in this volume in which certiorari has been applied for and denied, thus making the opinion of the Appellate Court final. (See Practice Act, sec. 121, J. & A. ¶ 8658.)

American McKenna Process Co. ads. Chicago G. W. R. Co. 166
Atwood ads. Brown 210
Aurora, E. & C. R. Co. ads. Shearer 225
Boger ads. Lounsberry 466
Bowes v. Pike 51
Brand v. Rueter 42
Brown v. Atwood 210
Chicago & N. W. Ry. Co. ads. Tindall 556
Chicago, G. W. R. Co. v. American McKenna Process Co. 166
Chicago Rys. Co. ads. Parker 9
City of Joliet ads. Hindle 159
City of Kankakee ads. Pickens 547
Dumont, Roberts & Co. v. McDougal 583
Fleming ads. Warnock 22
Follett v. Illinois Cent. R. Co. 289
Gibson v. Pitney 244
Graves ads. Old Colony Life Ins. Co. 71
Hindle v. City of Joliet 159
Illinois Cent. R. Co. ads. Follett 289
Lounsberry v. Boger 466
McDougal ads. Dumont, Roberts & Co 583
Nelson v. Nelson 584
Old Colony Life Ins. Co. v. Graves 71
Parker v. Chicago Rys. Co 9
Pickens v. City of Kankakee 547
Pike ads. Bowes 51
Pitney ads. Gibson 244
Rubendall v. Tarbox 260
Rueter ads. Brand 42
Tarbox ads. Rubendall 260
Tindall v. Chicago & N. W. Ry. Co 556
Shearer v. Aurora, E. & C. R. Co 225
Warnock v. Fleming 22

TABLE OF CASES REPORTED.

A.

Acme Automatic Printing Co. ads. McCoy..... 55
Adams Express Co. ads. Clendenin..... 430
Allison v. Belvidere Screw & Machine Co..... 465
American Ironing Machine Co. v. United States Lithograph Co.. 17
American McKenna Process Co. v. Chicago Great Western R. Co. 166
American Steel & Copper Plate Co. v. Bilter..... 175
Ancient Order of Gleaners ads. Thompson..... 200
Anderson v. Decatur Railway & Light Co..... 646
Anderson ads. De Salvo..... 29
Andrews ads. People ex rel. Kingsley..... 479
Appleton Mfg. Co. ads. Zukas..... 403
Askins ads. People ex rel. Price..... 621
Atwood ads. Brown..... 210
Aurora Brewing Co. ads. Greenacre..... 193
Aurora, Elgin & Chicago R. Co. ads. Shearer..... 225
Aurora Trust & Savings Bank v. Fidler..... 233

B.

Baker v. State's Accident Ins. Co..... 473
Barney ads. People..... 531
Barrell v. Lake Forest Water Co..... 529
Bellrose ads. Smith..... 368
Belvidere Screw & Machine Co. ads. Allison..... 465
Bilter ads. American Steel & Copper Plate Co..... 175
Blemaster v. Rockey..... 320
Board of Education, School Dist. No. 96, Fulton County, Illinois ads. Charles Johnson Hardware Co..... 638
Boger ads. Lounsberry..... 466
Bowes v. Pike..... 51
Bowman ads. Woods..... 612
Brand v. Rueter..... 42
Brown v. Atwood..... 210
Bruce ads. Farrell..... 588
Burkheimer v. Chicago, Rock Island & Pacific Ry. Co..... 424
Burns v. Clark..... 277
Butler v. National Live Stock Ins. Co..... 280
Butterfield v. Dickman..... 627

C.

Cellarius v. Junker..... 399
Charles Johnson Hardware Co. v. Board of Education, School Dist. No. 96, Fulton County, Illinois..... 638
Chemical Co., W. D. v. Teel..... 118
Chicago & Alton R. Co. ads. Heater..... 331
Chicago & Joliet Electric Ry. Co. ads. Tuohy..... 446
Chicago & Northwestern Ry. Co. ads. Tindall..... 556
Chicago, Burlington & Quincy R. Co. ads. Dunlavy..... 75
Chicago, Burlington & Quincy R. Co. ads. Eaves..... 380
Chicago Foundry Co. ads. Ryan..... 45
Chicago Great Western R. Co. v. American McKenna Process Co. 166
Chicago, Ottawa & Peoria Ry. Co ads. City of Spring Valley.. 352
Chicago, Peoria & St. Louis R. Co. ads. Mueller Grain Co..... 347
Chicago Rys. Co. ads. Parker..... 9
Chicago, Rock Island & Pacific Ry. Co. ads. Burkheimer..... 424
Chicago, Rock Island & Pacific Ry. Co. ads. Koepke..... 247
Chicago, Rock Island & Pacific Ry. Co. ads. Paden..... 100
Chicago, Rock Island & Pacific Ry. Co. ads. Wagner..... 305
Cigarmakers' International Union of America ads. Schildmiller 448
City of Chicago ads. People ex rel. Webster..... 35
City of Joliet ads. Hindle..... 159
City of Kankakee ads. Pickens..... 547
City of Mendota ads. Rogers..... 254
City of Ottawa ads. Dinneen..... 303
City of Ottawa ads. Douvia..... 131
City of Peoria v. Postal Telegraph-Cable Co..... 218
City of Peoria v. Western Union Telegraph Co..... 224
City of St. Charles ads. Johnson..... 184
City of Spring Valley v. Chicago, Ottawa & Peoria Ry. Co..... 352
Clark ads. Burns..... 277
Clendenin v. Adams Express Co..... 430
Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. ads. Crum.. 641
Coffey v. Mann..... 143
Coleman ads. People..... 610
Columbia Hardwood Lumber Co. ads. Ross Attley Lumber Co.. 65
Commercial State Bank of Forreston v. Folkerts..... 385
Congregation of Buai Abraham v. Kanner..... 640
Connors v. Winke 351
Couch v. Lake Shore Building Loan & Homestead Ass'n..... 56
County of Rock Island ads. Kreis..... 418
Crum v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co... 641
Curran v. Junk..... 208
Cutler ads. People ex rel. Wilson..... 469

D.

Dalton ads. Laughlin..... 342
Davis ads. Forbes..... 378
Davis Milk Machinery Co. v. Tappen..... 464
Decatur Railway & Light Co. ads. Anderson..... 646
Decker ads. Edward Thompson Co..... 179
Densby v. Umbricht..... 61
DePew ads. Friedberg..... 395
De Salvo v. Anderson..... 29
Dickman ads. Butterfield..... 627
Dinneen v. City of Ottawa..... 303
Donaghue v. Fraikin..... 339
Douvia v. City of Ottawa..... 131
Downer v. Warren..... 451
Dumont, Roberts & Co. v. McDougal..... 583
Dunlavy v. Chicago, Burlington & Quincy R. Co..... 75
Dunn ads. Fisher..... 63

E.

Eaves v. Chicago, Burlington & Quincy R. Co..... 380
Edward Thompson Co. v. Decker..... 179
Elgin, Joliet & Eastern Ry. Co. ads. Fleming..... 402
Elgin, Joliet & Eastern Ry. Co. ads. Rako..... 401
Ellers v. Peoria Ry. Co..... 487
Elliott ads. People..... 607
Erickson v. Svete..... 151
Erwin & Maxwell v. Johnson..... 644

F.

Fabry ads. Paxton..... 104
Falkenau v. Smedley..... 6
Farmers State Bank of Newark, Illinois ads. Illinois Midland Ry. Co..... 591
Farrell v. Bruce..... 588
Feldman v. Polishuck..... 15
Ferkel ads. Robbs Express Co..... 471
Fidler ads. Aurora Trust & Savings Bank..... 233
Fisher v. Dunn..... 63
Fitzsimmons ads. Van Cleave..... 609
Fleming v. Elgin, Joliet & Eastern Ry. Co..... 402
Fleming ads. Warnock..... 22
Flynn v. Southern Surety Co..... 38
Folkerts ads. Commercial State Bank of Forreston..... 385
Follett v. Illinois Cent. R. Co..... 289
Forbes v. Davis..... 378

Forbes ads. Penn Mutual Life Ins. Co..... 441
Fraikin ads. Donaghue..... 339
Fraternal Reserve Life Ass'n ads. Martin..... 359
Friedberg v. DePew..... 395

G.

Galesburg Railway, Lighting & Power Co. ads. Johnson Oil Refining Co..... 392
General Accident Fire & Life Assur. Corp. Ltd. v. Krekel..... 467
Gibson v. Pitney..... 244
Glick ads. People..... 46
Goeke ads. Witteman Co..... 108
Graves ads. Old Colony Life Ins. Co..... 71
Green ads. People..... 59
Greenacre v. Aurora Brewing Co..... 193
Griesser v. Taylor..... 549

H.

Harmon Drainage Dist. No. 2 of Lee County, Illinois v. Parker. 577
Harris v. Schlink..... 202
Hartford Fire Ins. Co. ads. Wilson..... 626
Harty ads. Ryan..... 470
Heater v. Chicago & Alton R. Co..... 331
Heren v. Illinois Central R. Co..... 528
Herrick ads. People..... 428
Hindle v. City of Joliet..... 159
Hobbs v. Monarch Refrigerating Co..... 1
Hoeft v. Hoeft..... 49
Hogle ads. McCloud..... 483
Holden ads. White..... 643

I.

Illinois Cent. R. Co. ads. Follett..... 289
Illinois Cent. R. Co. ads. Heren..... 528
Illinois Midland Ry. Co. v. Farmers State Bank of Newark, Illinois..... 591
Ingraham v. Mariner..... 53
Interstate Independent Telephone & Telegraph Co. ads. Romberg..... 509

J.

Jacobson v. Ramey..... 96
Jester v. Lee..... 183

Jewel Tea Co. v. Peterson..... 157
Jibben ads. National Cash Register..... 600
John Hancock Mutual Life Ins. Co. v. Watson..... 315
Johnson v. City of St. Charles..... 184
Johnson ads. Erwin & Maxwell..... 644
Johnson ads. People..... 603
Johnson Oil Refining Co. v. Galesburg Railway, Lighting & Power Co..... 392
Jones ads. Weeks..... 215
Joseph Schlitz Brewing Co. v. Miller..... 633
Judd ads. Larson..... 420
Junk ads. Curran..... 208
Junker ads. Cellarius..... 399

K.

Kanner ads. Congregation of Bnai Abraham..... 640
Kays ads. Town of Magnolia..... 122
Keefe ads. Stoddard..... 514
Kennedy ads. Connor..... 426
Kingman v. Kingman..... 338
Knoll ads. People ex rel. Kelly..... 595
Koepeke v. Chicago, Rock Island & Pacific Ry. Co..... 247
Kopf v. Yordy..... 409
Kreis v. County of Rock Island..... 418
Krekel ads. General Accident Fire & Life Assur. Corp., Ltd.... 467

L.

Lake Forest Water Co. ads. Barrell..... 529
Lake Shore Building Loan & Homestead Ass'n ads. Couch..... 56
Larson v. Judd..... 420
Laughlin v. Dalton..... 342
Lawhun ads. Maple..... 258
Lawrence v. Wendnagel..... 32
Lee ads. Jester..... 183
Lewis v. New Amsterdam Casualty Co..... 553
Loofbourrow ads. Swan..... 116
Lounsberry v. Boger..... 466
Lund v. Osborne..... 457

M.

McCloud v. Hogle..... 483
McCoy v. Acme Automatic Printing Co..... 55
McDonald ads. Millett..... 149
McDougal ads. Dumont, Roberts & Co..... 583

Mann ads. Coffey 143
Maple v. Lawhun 258
Marcy v. Marcy 273
Mariner ads. Ingraham 53
Martin v. Fraternal Reserve Life Ass'n 359
Massieon ads. People ex rel. Tilden 86
Mehl ads. Swain 496
Merrick v. Rooney 26
Mertel v. Walter 136
Miller ads. Joseph Schlitz Brewing Co. 633
Miller v. Thomas 125
Millett v. McDonald 149
Mills v. Village of Oquawka 119
Mitchell ads. Wallin 324
Monarch Refrigerating Co. ads. Hobbs 1
Mueller Grain Co. v. Chicago, Peoria & St. Louis R. Co. 347

N.

National Cash Register Co. v. Jibben 600
National Croation Society of the United States, America v. Pavlic 601
National Live Stock Ins. Co. ads. Butler 280
Nelson v. Nelson 584
Ness ads. People 69
New Amsterdam Casualty Co. ads. Lewis 553

O.

O'Connor v. Kennedy 426
Old Colony Life Ins. Co. v. Graves 71
Old Rose Distilling Co. v. Parkhill 48
Osborne ads. Lund 457

P.

Paden v. Chicago, Rock Island & Pacific Ry. Co. 100
Palm v. Rockford City Traction Co. 115
Parker v. Chicago Rys. Co. 9
Parker ads. Harmon Drainage Dist. No. 2 of Lee County, Illinois 577
Parkhill ads. Old Rose Distilling Co. 48
Pavlic ads. National Croation Society of the United States of America 601
Paxton v. Fabry 104
Penn Mutual Life Ins. Co. v. Forbes 441
People v. Barney 531

People v. Coleman 610
People v. Elliott 607
People v. Glick 46
People v. Green 59
People v. Herrick 428
People v. Johnson 603
People v. Ness 69
People v. Powers 536
People v. Rice 68
People v. Rosenberg 13
People v. Schenk 605
People v. Schlick 605
People v. Seibert 605
People v. Shearer 605
People v. Tice 617
People ex rel. Britt v. School Directors Dist. No. 89 in Stephanson County 250
People ex rel. Kelly v. Knoll 595
People ex rel. Kingsley v. Andrews 479
People ex rel. Morrison v. Schwiesow 238
People ex rel. Price v. Askins 621
People ex rel. Tilden v. Massieon 86
People ex rel. Webster v. City of Chicago 35
People ex rel. Wilson v. Cutler 469
Peoria Ry. Co. ads. Ellers 487
Peterson ads. Jewel Tea Co. 157
Pickens v. City of Kankakee 547
Pierce v. Village of North Utica 527
Pike ads. Bowes 51
Pitney ads. Gibson 244
Polishuck ads. Feldman 15
Pooler v. Southwick 301
Postal Telegraph-Cable Co. ads. City of Peoria 218
Postal Telegraph-Cable Co. ads. Strom 431
Powers ads. People 536
Public Service Co. of Northern Illinois and City of Ottawa ads. Siegert 476

R.

Rako v. Elgin, Joliet & Eastern Ry. Co. 401
Ramey ads. Jacobson 96
Rice ads. People 68
Richey v. State Bank of Latham 624
Robbs Express Co. v. Ferkel 471
Rockey ads. Blemaster 320
Rockford City Traction Co. ads. Palm 115

Rogers v. City of Mendota..... 254
Romberg v. Interstate Independent Telephone & Telegraph Co... 509
Rooney ads. Merrick..... 26
Rosenberg ads. People..... 13
Ross Attley Lumber Co. v. Columbia Hardwood Lumber Co..... 65
Rubendall v. Tarbox..... 260
Rueter ads. Brand..... 42
Ryan v. Chicago Foundry Co..... 45
Ryan v. Harty..... 470

S.

Schenk ads. People..... 605
Schildmiller v. Cigarmakers' International Union of America.. 448
Schlick ads. People..... 605
Schlink ads. Harris..... 202
School Directors Dist. No. 89 in Stephanson County ads. People ex rel. Britt..... 250
Schwiesow ads. People ex rel. Morrison..... 238
Seibert ads. People..... 605
Shearer v. Aurora, Elgin & Chicago R. Co..... 225
Shearer ads. People..... 605
Siegert v. Public Service Co. of Northern Illinois and City of Ottawa 476
Smedley ads. Falkenau..... 6
Smith v. Bellrose..... 368
Southern Surety Co. ads. Flynn..... 38
Southwick ads. Pooler..... 301
State Bank of Latham ads. Richey..... 624
State's Accident Ins. Co. ads. Baker..... 473
Stauber v. Stauber..... 137
Stoddard v. Keefe..... 514
Strickler v. Umbdenstock..... 20
Strom v. Postal Telegraph-Cable Co..... 431
Struck ads. Westchester Fire Ins. Co..... 501
Svete ads. Erickson..... 151
Swain v. Mehl..... 496
Swan v. Loofbourrow..... 116

T.

Tappen ads. Davis Milk Machinery Co..... 464
Tarbox ads. Rubendall..... 260
Taylor ads. Griesser..... 549
Teel ads. W. D. Chemical Co..... 118
Thomas ads. Miller..... 125
Thompson v. Ancient Order of Gleaners..... 200

Thompson Co., Edward v. Decker..... 179
Tice ads. People..... 617
Tindall v. Chicago & Northwestern Ry. Co..... 556
Town of Magnolia v. Kays..... 122
Tuohy v. Chicago & Joliet Electric Ry. Co..... 446
Two Rivers Coal Co. v. Vaughn..... 647

U.

Umbdenstock ads. Strickler..... 20
Umbricht ads. Densby..... 61
United States Lithograph Co. v. American Ironing Machine Co. 17

V.

Van Cleave v. Fitzsimmons..... 609
Vaughn ads. Two Rivers Coal Co..... 647
Village of North Utica ads. Pierce..... 527
Village of Oquawka ads. Mills..... 119

W.

Wagner v. Chicago, Rock Island & Pacific Ry. Co..... 305
Wallin v. Mitchell..... 324
Walter ads. Mertel..... 136
Warnock v. Fleming..... 22
Warren ads. Downer..... 451
Watson ads. John Hancock Mutual Life Ins. Co..... 315
W. D. Chemical Co. v. Teel..... 118
Weeks v. Jones..... 215
Wendnagel ads. Lawrence..... 32
Westchester Fire Ins. Co. v. Struck..... 501
Western Union Telegraph Co. ads. City of Peoria..... 224
White v. Holden..... 643
Wilson v. Hartford Fire Ins. Co..... 626
Winke ads. Connors..... 351
Witteman Co. v. Goeke..... 108
Woods v. Bowman..... 612

Y

Yordy ads. Kopf..... 409

Z.

Zukas v. Appleton Mfg. Co..... 403

CASES

DETERMINED IN THE

FIRST DISTRICT

OF THE

APPELLATE COURTS OF ILLINOIS

DURING THE YEAR 1916.

William F. Hobbs, trading as William F. Hobbs & Company, Appellee, v. Monarch Refrigerating Company, Appellant.

Gen. No. 21,271. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed June 19, 1916.

Statement of the Case.

Bill for an accounting by William F. Hobbs, trading as William F. Hobbs & Company, complainant, against Monarch Refrigerating Company, a corporation, defendant. From a decree awarding the complainant $4,328.70, defendant prosecutes this appeal.

The allegations of the bill were in part that defendant represented that all of complainant's poultry had been destroyed by the fire and this was discovered only after the settlement; that it adjusted the loss with the insurance companies for more than $15,000 and

deducted from this sum the amount due defendant and paid complainant the balance; that these representations were false and fraudulent and that defendant sold and disposed of complainant's merchandise for more than $24,000 and retained the proceeds thereof.

Defendant contended that the proof did not sustain the material allegations of the bill; that there was a variance between allegations of the bill on the one hand and the findings of the master and decree of the court on the other, and that this variance violated the elementary rule that the allegations of the bill, the proof and the decree must correspond, and therefore constituted reversible error. It was argued that the principal material allegation of the bill was the fraudulent representation made by defendant to complainant that his poultry was wholly destroyed and that he discovered this after the settlement hereinafter mentioned, and that there was no proof to sustain this allegation, and no such finding in the master's report or in the decree.

It appeared that defendant was engaged in the public warehouse and cold storage business, and complainant in the wholesale produce and commission business, dealing principally in poultry. Prior to March 19, 1911, complainant delivered to defendant, for storage, merchandise consisting chiefly of poultry, of the value of more than $21,000. When the poultry was delivered to defendant it issued its warehouse receipts to complainant, also an insurance certificate wherein the defendant agreed to insure the poultry for the full amount of such insurance certificate, the policy to be payable to defendant as trustee for complainant; and in case of loss by fire, defendant was to act as agent for complainant in the collection of the insurance. On said date, defendant had issued to complainant insurance certificates amounting to $18,600. Defendant

paid the premiums and debited complainant with the same. Complainant was indebted to defendant on various notes secured by the poultry stored in the warehouse, the notes aggregating $12,133, and there was a further indebtedness of $1,175.41. On March 19, 1911, a fire started on the fifth floor of the warehouse, which was a seven story and basement building. At the time there was stored in the warehouse 2,250,410 pounds of butter and 1,033,960 pounds of poultry, belonging to different persons, including complainant. All of the poultry and butter was destroyed or damaged by fire and water, and defendant adjusted the loss with the insurance companies. Complainant was dissatisfied with the proposed adjustment and employed an insurance adjuster; defendant also employed an adjuster. The adjustment was carried on and an agreement reached with the insurance companies by defendant alone. The insurance collected on complainant's property amounted to $11,231.63. Complainant objected to the amount of the settlement, but was informed by defendant that a settlement had been made, and on August 16, 1911, after deducting the amount due and owing from complainant, defendant paid complainant the balance, amounting to $2,110.53, and took a receipt which was "in full of all claims and demands against the Monarch Refrigerating Company growing out of the fire of March 19, 1911." After the fire, complainant received from defendant certain of the damaged poultry but was unable to dispose of all of it and returned the balance. Defendant then disposed of all of the salvage, selling 497,861 pounds of damaged poultry for $45,899.26, or an average of 9.2 cents per pound. No record was kept by defendant from which could be ascertained the prices and amount received for complainant's damaged poultry, 91,691 pounds of which was included in the above salvage.

The master found that defendant was liable for

complainant's poultry unaccounted for at the average price of 9.2 cents per pound, or $8,435.57. This amount added to the insurance collected made a total amount due and owing from defendant to complainant of $19,667.20. Complainant had received $15,418.94, which left a balance of $4,248.26, with interest from August 16, 1911, for which amount the decree was entered.

Defendant contended that as complainant was experienced in handling poultry and was represented by an able fire insurance adjuster, the settlement made August 16, 1911, was conclusive and binding. The master found that at the time of the execution of the receipt by complainant as above mentioned, he knew that all of his property had not been destroyed by fire; that defendant had been selling damaged poultry and had sold some of complainant's; that complainant did not know the amount of money received by defendant from the insurance companies on complainant's property, and did not know the prices at which defendant was selling the damaged poultry nor the amount of money it realized from the sale of the same; that defendant never rendered complainant any statement showing the amount of insurance or the amount of money received from the sale of the damaged poultry.

MANCHA BRUGGEMEYER, for appellant.

SHEPARD, MCCORMICK, THOMASON, KIRKLAND & PATTERSON, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. ACCOUNT, § 35*—*when evidence sufficient to support master's findings.* On a bill for an accounting, evidence examined and *held* to support master's findings.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hobbs v. Monarch Refrigerating Co., 200 Ill. App. 1.

2. APPEAL AND ERROR, § 1458*—*when variance immaterial.* On a bill for an accounting, variance between allegations of bill on the one hand and the findings of the master and the decree of the court on the other, examined and *held* not so material as to warrant a reversal.

3. PRINCIPAL AND AGENT, § 28*—*what degree of good faith required in transactions between.* In dealing with the property of the principal on his own behalf, the utmost good faith is required of the agent, and the burden is upon him to show that such good faith was exercised.

4. CONTRACTS, § 268*—*what evidence sufficient to set aside contract where fiduciary relation exists.* Where a fiduciary relation exists, it is not necessary to establish intentional or actual fraud in order to set aside a contract.

5. PRINCIPAL AND AGENT, § 55*—*when settlement between principal and agent set aside.* Where a warehouseman, in whose warehouse property of plaintiff had been damaged by fire, effected a settlement with insurers with whom it had insured the property for plaintiff's benefit, and thereafter had a settlement with plaintiff without informing him of the amount it received for insurance and salvage, there is such a breach of the fiduciary relation between it and plaintiff as to warrant the court in setting aside the settlement between them in an action for an accounting.

6. ACCOUNT, § 35*—*when burden of proof on agent on bill by principal for an accounting.* On a bill for an accounting by the owner of property against a warehouseman to recover the amount received by defendant as salvage on injury to complainant's property by fire, the burden of showing the number of pounds of salvage and the price received therefor *held*, under the facts of the case, to be upon defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Esther F. Falkenau, Appellee, v. Dr. N. J. Smedley, Appellant.

Gen. No. 21,213. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed June 19, 1916.

Statement of the Case.

Action by Esther F. Falkenau, plaintiff, against Dr. N. J. Smedley, defendant, on a promissory note. From judgment for $531.02 in favor of plaintiff, defendant appeals.

It appeared from the evidence that plaintiff was the owner of a series of notes aggregating $8,800, which were secured by a mortgage on certain lands in the State of Michigan. The statement of claim set up a written contract between the parties whereby the defendant, in consideration of the extension of the time of payment on one of the notes, assumed and agreed to pay said note, the interest on all of the notes outstanding and the taxes for the year 1913 on the mortgaged lands.

The defendant filed an affidavit of merits, and a statement of set-off for $1,110. The plaintiff then filed an affidavit of merits to the defendant's statement of set-off. Afterwards, on motion of the plaintiff, the defendant's affidavit of merits and statement of set-off were stricken from the files, and the defendant was given leave to file an amended affidavit of merits and statement of set-off within ten days. The defendant afterwards filed an amended affidavit of merits, which was also stricken from the files on motion of the plaintiff. At the same time the court denied the motion of the defendant for leave to file an amended statement

of set-off, and judgment by default was entered against the defendant for the amount of plaintiff's claim.

The items set forth in the amended statement of set-off were as follows: Keep, care and feed of one horse on farm six months, $30 per month, $180; care and feed of one collie dog on farm six months, $15 per month, $90; storage of wine, eight months, $30 per month, $240; use of part of house and storage of furniture, six months, $100 per month, $600; total $1,110.

Defendant contended that his amended affidavit of merits alleged facts which constituted a defense to plaintiff's claim. It set up that defendant was a mere guarantor of the payment of the several sums specified in the contract sued on, and that the plaintiff had made no effort to collect from the principal debtors, or realize the amounts due out of the security, which was more than sufficient to pay the amount remaining unpaid. The contract stated that "Dr. N. J. Smedley hereby assumes and agrees to pay" the several sums therein mentioned.

ARTHUR L. BALLAS, for appellant.

JESSE LOWENHAUPT and CHARLES LEVITON, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 800*—*when questions not properly preserved for review.* A contention that the trial court erred in striking a statement of set-off from the files is not properly preserved for review where the motion to strike the statement from the files and the order of court entered thereon are not contained in the bill of exceptions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

2. APPEAL AND ERROR, § 1687*—*when error in striking statement of set-off from files waived.* Where, after defendant's statement of set-off is stricken from the files on plaintiff's motion, defendant does not elect to stand by his statement, but asks for and is given leave to file an amended statement, any error in striking the statement is waived.

3. APPEAL AND ERROR, § 1362*—*when refusal to allow filing of amended pleading not abuse of discretion.* Where leave was given to file an amended statement of set-off within ten days and it was not filed until the sixteenth day and no excuse offered for failure to file it in the time set, the refusal of the court to grant a motion to file it instanter is not an abuse of discretion.

4. SET-OFF AND RECOUPMENT, § 8*—*what proper matter for set-off.* In order for a claim to be proper matter for set-off, it must have arisen out of the contract sued upon by the plaintiff or if it arises out of a separate transaction, it must be for liquidated damages.

5. SET-OFF AND RECOUPMENT, § 8*—*when claim not proper one for set-off.* Statement of set-off examined and *held* not to set up a claim arising out of the contract sued upon by the plaintiff nor to be for liquidated damages.

6. SET-OFF AND RECOUPMENT, § 6*—*when claim for services under implied contract not ground for set-off.* A claim for services rendered under an implied contract is not proper to be allowed as set-off, where it does not arise out of the claim sued on by plaintiff.

7. PLEADING, § 153*—*when defense not set up by affidavit of merits.* Affidavit of merits examined and *held* not to allege facts constituting a defense to plaintiff's claim.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Alfred Parker, Appellee, v. Chicago Railways Company and Chicago City Railway Company (Impleaded with Rittenhouse & Embree Company), Appellants.

Gen. No. 21,380. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. DANIEL W. MADDOX, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed June 19, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action on the case by Alfred Parker, plaintiff, against Chicago Railways Company and Chicago City Railway Company, impleaded with Rittenhouse & Embree Company, defendants, to recover for personal injuries. A judgment was entered for $3,000 in favor of plaintiff against Chicago Railways Company and Chicago City Railway Company. The jury returned a verdict of not guilty as to the defendant Rittenhouse & Embree Company.

The defendants contended that the argument of counsel for plaintiff to the jury was improper. In his opening argument to the jury counsel for plaintiff said:

"Of course, I cannot prove, and there is no evidence in here, of what he lost in his business, and I cannot give you that, for it would be improper.

"Mr. Rosenthal: I object.

"The Court: Objection sustained; if it is not here don't argue about it.

"Mr. Ranes: It is not here and I am not arguing about it.

"The Court: Then don't argue, don't mention it."

And continuing, counsel argued that the jury had a right to assume that since the plaintiff was still suffering, more than two years after the accident, he would continue to suffer, and that while plaintiff testi-

fied that he hoped and believed he would ultimately recover, such statement by plaintiff was not final or conclusive, but that the jury had a right to take the evidence in the case into consideration in determining the question whether the plaintiff would ultimately recover, such statement by plaintiff was not final or will recover." The court overruled an objection to this argument and said: "Counsel has a right to draw reasonable conclusions from the evidence; but the jury know what the evidence is."

In his closing argument counsel for plaintiff said:

"Now there is some excuse for the man they ran into on the lumber wagon not being here, and we are not surprised after hearing this evidence to know that he is where he is.

"Mr. Rosenthal: Just a moment—

"Mr. Ranes: You are not surprised at that information—

"Mr. Rosenthal: Just a moment—

"Mr. Ranes: The force of that collision under the evidence here would explain very likely why he is where he is.

"Mr. Rosenthal: That statement—it can mean but one thing—that the man died as a result of the injury, and I object to it.

"Mr. Ranes: I didn't say anything of the kind.

"The Court: Wait until the objection gets into the record.

"Mr. Rosenthal: That statement and the inference resulting therefrom not being based on the evidence in this case, I respectfully object to.

"The Court: Objection sustained, and the jury will disregard it."

PHILIP ROSENTHAL and FRANK L. KRIETE, for appellants; J. R. GUILLIAMS and W. W. GURLEY, of counsel.

A. H. RANES and HIRAM BLAISDELL, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to support verdict in action for injury to passenger on street car.* In an action by a passenger against a street railroad company to recover for personal injuries alleged to have been caused by being thrown against parts of the car on which he was riding by its collision with a wagon at a street crossing, evidence examined and *held* sufficient to support the verdict.

2. DAMAGES, § 110*—*when damages in action for injury to passenger not excessive.* In an action by a passenger against a street railroad company to recover for injuries caused by the collision of the car with a wagon, where the evidence shows that at the time of the accident plaintiff was about sixty years old, was healthy and active, was, and had been for about forty years, a stair builder, maintaining a shop, and tends to show that he was unable to attend to his business as a result of his injuries and had to employ additional help, that following the accident he suffered great pain and continued to suffer more or less pain from the accident to the date of the trial, and is sufficient to warrant a finding that his injuries are permanent, a verdict of $3,000 is not excessive.

3. APPEAL AND ERROR, § 1514*—*when statement of belief by counsel harmless error.* An expression of belief by counsel, in the course of argument, which is based wholly on the evidence, if erroneous, is harmless.

4. APPEAL AND ERROR, § 1514*—*when statement by counsel in argument harmless error.* Where the only ill effect of an argument of counsel to which objection is made would be unduly to increase the amount of the verdict, and the Appellate Court has found that the verdict was not excessive, such argument is not ground for reversal.

5. TRIAL, § 123a*—*when argument of counsel improper.* Argument of counsel in an action for personal injuries, examined and *held* improper.

6. APPEAL AND ERROR, § 1514*—*when argument of counsel not ground for reversal.* Even though the argument of counsel was improper, where the court promptly sustained an objection thereto and directed the jury to disregard it, such argument is not ground for reversal.

7. INSTRUCTIONS, § 88*—*when instruction as to preponderance improper.* An instruction that the preponderance of the evidence is not to be determined alone by the number of witnesses testifying, that in determining the question, the jury may take into considera-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tion the number of witnesses, their conduct and demeanor while testifying, their apparent intelligence or lack of intelligence, their interest or lack of interest in the result of the suit, if any, their opportunities for knowing the matters about which they testify, and from all these circumstances determine on which side the preponderance of the evidence lies, is objectionable in that it limits the jury, in determining the question of preponderance, to a consideration of the elements enumerated.

8. INSTRUCTIONS, § 88*—*what may be considered by jury in determining question of preponderance of evidence.* In determining the question of the preponderance of the evidence, the jury should be left free to consider all the evidence and all the facts and circumstances in evidence, determining where the preponderance or greater weight of the evidence lies.

9. INSTRUCTIONS, § 89*—*when instruction as to preponderance of evidence objectionable.* An instruction which, after enumerating certain things that the jury should take into consideration in determining upon which side the preponderance or greater weight of the evidence lies, tells the jury that they should consider these in view of all the other evidence, facts and circumstances proven on the trial, is objectionable in that it omits the element of the number of witnesses.

10. INSTRUCTIONS, § 88*—*when instructions as to preponderance not misleading.* Instructions as to preponderance of the evidence, examined and *held* not misleading, though not strictly accurate.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error v. Louis Rosenberg, Plaintiff in Error.

Gen. No. 22,169. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed June 26, 1916.

Statement of the Case.

Information by the People of the State of Illinois, plaintiff, against Louis Rosenberg, defendant, charging him with the crime of obtaining money by false pretenses. Defendant was found guilty and sentenced to imprisonment and fined. By writ of error he seeks to have the judgment of the court reversed.

The information charged that the defendant on a certain day, in Chicago, "did with intent to cheat and defraud and to obtain money by false pretenses, did obtain from the affiant the sum of one hundred and fifty dollars ($150) by falsely representing to this affiant that,"—followed by averments in detail of a number of representations made by the defendant as to services performed by him and expenses incurred and correlative averments denying that defendant had done each one of the things which he represented to have been done by him.

E. M. SEYMOUR, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

The People v. Rosenberg, 200 Ill. App. 13.

Abstract of the Decision.

1. FALSE PRETENSES, § 27*—*when information for obtaining money by false pretenses sufficient.* An information charging the obtaining of money by false pretenses is not rendered insufficient by the omission of the statutory word "designedly," where it avers, with particularity, representations of things done, with a negative averment as to their performance, as knowledge and design will be implied under such conditions.

2. FALSE PRETENSES, § 27*—*when information for obtaining money by false pretenses sufficient.* Where an information charging the obtaining of money by false pretenses is sworn to by a named person, an averment that the money was obtained from "this affiant" is sufficient.

3. CRIMINAL LAW, § 502*—*when word "money" in information presumed lawful money.* On an information for obtaining money by false pretenses, it will be presumed that the money was genuine money of the United States, unless the information is challenged by motion to quash.

4. INDICTMENT AND INFORMATION, § 59*—*when objection must be raised by motion to quash.* On an indictment for obtaining money by false pretenses, failure of the information to specify the kind and value of the money must be raised by a motion to quash.

5. FALSE PRETENSES, § 27*—*when information for obtaining money by false pretenses sufficient.* On an information for obtaining money by false pretenses, *held* that it sufficiently appeared that the person defrauded was the person filing the information and that such person relied upon the representations made to her.

6. FALSE PRETENSES, § 13*—*when person making false representation charged with knowledge of its falsity.* On an information for obtaining money by false pretenses, if defendant made representations as to things done by him, while the fact was that he did not do them, it follows that he knew such representations were false.

7. FALSE PRETENSES, § 33*—*when ownership of property presumed.* On an information for obtaining money by false pretenses, it will be presumed that the person filing the information owned the money which was obtained from her.

8. CRIMINAL LAW, § 366*—*when defects in substance of information not reached by motion in arrest of judgment.* Defects going to the substance of an information cannot be reached by a motion in arrest of judgment but by a motion to quash.

9. CRIMINAL LAW, § 497*—*what effect of failure to preserve proceedings in bill of exceptions.* In the absence of a complete bill of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

exceptions showing all of the proceedings before the trial court, every presumption is in favor of the regularity and sufficiency of such proceedings.

Abram Feldman, Defendant in Error, v. Abram Polishuck and Sarah Polishuck, Plaintiffs in Error.

Gen. No. 22,216.

PLEADING, § 69*—*when filing of demurrer not pleading to declaration.* After judgment by confession against defendant, leave was given him, on his motion, to plead to plaintiff's declaration, whereupon defendant filed a general demurrer to the declaration, which was overruled, and defendant was required to plead instanter and, upon his declining to do so, he was defaulted for failure to comply with the rule to plead. *Held*, that judgment against defendant was proper.

Error to the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed June 26, 1916.

M. A. ZELENSKY, for plaintiffs in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

In this case judgment for $1,025 was entered against defendants upon a declaration and *cognovit* by virtue of a power of attorney contained in a judgment note authorizing any attorney of record to appear and confess judgment in favor of the holder of the note. Upon motion of the defendants, leave was given by the court to defendants "to plead to the plaintiff's declaration

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

within ten days." The judgment was ordered to stand as security. Thereupon defendants filed a general demurrer to plaintiff's declaration. The court overruled this demurrer and required defendants to plead instanter. Defendants declining to do this, they were defaulted for failure to comply with the rule to plead, and it was ordered that the judgment stand in full force and effect.

Did the defendants by filing a general demurrer comply with the order of the court giving leave to plead to the declaration? We hold that they did not. It has many times been held that the motion for leave to plead to a declaration, where a judgment has already been entered by confession, is addressed to the equitable discretion of the court. This would imply that there should be brought to the attention of the court facts or matters constituting a meritorious defense, that is, facts which if proven would induce the court to be of the opinion that it would work an injustice to permit the judgment to stand. When, therefore, the court, in the exercise of its equitable discretion, has entered an order giving leave to defendant "to plead to the declaration," we are of the opinion that the use of the word "plead" must be confined to the original and technical sense in which the word is used. Chitty makes the statement that pleas "go to the merits of the case," as distinguished from a demurrer, which means that a defendant "will go no further because the other has not shown sufficient matter against him that he is bound to answer." Or, as Stephen on Pleading puts it (p. 46): "If the defendant does not demur, his only alternative method of defense is to oppose or answer the declaration by matter of *fact*. In so doing, he is said to *plead* (by way of distinction from *demurring*) and the answer *of fact* so made, is called the *plea*." It must be in this sense that leave was given to defendants "to plead," and defendants failing to do

so were rightly adjudged to be in default. This view is entirely consisent with what is said in *Borchsenius v. Canutson,* 100 Ill. 82.

The judgment was proper and is affirmed.

Affirmed.

United States Lithograph Company, Plaintiff in Error v. American Ironing Machine Company, Defendant in Error.

Gen. No. 22,243. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the March term, 1916. Reversed and judgment here. Opinion filed June 26, 1916.

Statement of the Case.

Action by the United States Lithograph Company, a corporation, plaintiff, against American Ironing Machine Company, a corporation, defendant, to recover a balance due for goods, wares and merchandise sold to defendant under a certain contract. Defendant by its affidavit of defense denied the making of the contract as alleged by plaintiff, alleged the making of another contract covering the same subject-matter, in which plaintiff was in default and consequently indebted to defendant, for which it claimed a set-off for the amount of $190.10. Upon trial by the court, the issues were found for the defendant as to plaintiff's statement of claim and for the plaintiff as to defendant's set-off. To reverse the judgment, plaintiff prosecutes this writ of error and defendant files cross-errors as to its claim of set-off.

The evidence showed that plaintiff was engaged in

the lithographing business at Norwood, Ohio, and that the defendant was located in Chicago. In the fall of 1913, Mr. F. L. Wilke, a Chicago salesman for the plaintiff, called several times upon the defendant and solicited an order for a quantity of lithograph displays, known to the trade as "cutouts." After negotiations defendant placed with Mr. Wilke an order written on one of the printed forms of the defendant. This order was not accepted by plaintiff, which made out an order on one of its own printed blanks, and through its salesman, Mr. Wilke, this latter order was presented to defendant and signed by it. This order, which contained a number of specifications and details, was for 2,000 cutouts at a price of 65 cents each, totaling $1,300. At the bottom of the order, which was printed in part and partly typewritten, was the clause: "Subject to acceptance in City of Norwood, Ohio, by the United States Printing & Lithographing Company, sole sales agent." In reply to this order plaintiff sent to defendant a purported acceptance which in several particulars was not in accord with the terms of the order. Immediately upon receipt of this, defendant wrote to plaintiff noting the variances and asking plaintiff to acknowledge receipt of the latter, "as the order is somewhat at variance with your acknowledgment." To this plaintiff replied, saying: "We did not reply to yours of January 3rd, having referred same to our Chicago office to take up with you." Subsequently Mr. Wilke, of the Chicago office of the plaintiff, called upon defendant to settle the matters raised in the above correspondence. At this and a subsequent interview the defendant, acting through its president, Mr. Grosse, and Mr. Wilke, representing the plaintiff, entered into an oral contract as follows: The defendant agreed to purchase from plaintiff 1,000 cutouts, defendant to pay plaintiff $900 therefor, the whole 1,000 cutouts to be billed and paid for immediately, the cutouts to be kept in storage by the plaintiff and shipped to the

defendant in lots of about 250 at such times as the defendant should call for them. Subsequently 511 of these cutouts were shipped to and accepted by the defendant, and a bill for 1,000 cutouts was rendered the defendant in March, 1914, for $650, which was paid. Under the oral contract for 1,000 cutouts, 489 more were due to the defendant. Plaintiff did not ship this number but shipped 1,600 cutouts in a single shipment, and insisted upon the defendant accepting the same. No opportunity was given defendant to accept the balance due on its contract for 1,000 cutouts, that is, 489. The defendant refused to accept this shipment from the railroad company.

Plaintiff claimed the existence of a contract of purchase for 2,000 cutouts. Defendant maintained that the only contract made between the parties was the oral contract for 1,000 cutouts, and that as it has advanced payment for cutouts not delivered, it was entitled to recover on its set-off.

CULVER, ANDREWS, KING & COOK, for plaintiff in error.

FYFFE, RYNER & DALE, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 385*—*when evidence insufficient to establish.* In an action to recover a balance claimed to be due for goods sold, evidence examined and *held* insufficient to establish the contract sued upon.

2. CONTRACTS, § 44*—*when acceptance insufficient.* An acceptance which varies from the terms of the proffered contract does not constitute a valid acceptance of such contract.

3. PRINCIPAL AND AGENT, § 165*—*when principal estopped to repudiate authority of agent.* One who refers another to a third per-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

son as authorized to act for him is estopped to deny the latter's authority to enter into a contract on his behalf.

4. CONTRACTS, § 387*—*when evidence sufficient to show breach.* Evidence examined and *held* sufficient to show a breach of contract.

Max Stricker, Defendant in Error, v. William M. Umbdenstock, Plaintiff in Error.

Gen. No. 22,294.

CONTRACTS, § 32*—*when element of meeting of minds lacking.* Where the owner of goods in a warehouse directed an insurance solicitor to telephone an order to defendant insurance agent to place insurance on such goods and the solicitor so telephoned, but defendant understood the message to be to insure goods of the owner in another warehouse and so wrote the policy, there was no meeting of the minds of the parties giving rise to a contractual relation between them so as to render defendant liable upon the loss by fire of the goods sought to be insured.

Error to the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in this court at the March term, 1916. Reversed and judgment here. Opinion filed June 26, 1916.

FURBER & WAKELEE, for plaintiff in error.

ADLER, LEDERER & BECK, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff, alleging loss resulting from the negligent execution of an order for fire insurance given by him to defendant, an agent of the insurance company, upon trial had judgment for eight hundred dollars, which we are asked to reverse.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Desiring to place fire insurance on a lot of whisky owned by him in a United States warehouse, designated as warehouse "A," plaintiff called at the office of Charles Kressman, an insurance solicitor, who undertook to telephone this order to the defendant. Plaintiff testified that he heard Kressman telephone the order as he gave it to Kressman, that is, for insurance on whisky in warehouse "A," Kressman, testifying, does not recall what was said by him over the telephone, but says he gave the order as plaintiff gave it to him. Defendant, testifying, says that as he heard the telephone message at the other end of the wire it was for insurance on whisky in warehouse "D"; that he so noted it at the time on a written memorandum or order blank, which is in evidence. The policy was written on the goods of plaintiff in warehouse "D" and delivered to Kressman, who delivered it to a clerk of plaintiff's who left it with a bank as part of the collateral for a loan. Plaintiff never examined the policy. Subsequently there was a loss by fire in warehouse "A," and plaintiff then discovered that the policy did not cover his goods in "A" but covered his goods in warehouse "D."

Under such circumstances plaintiff cannot recover damages from defendant, for the reason that there was no contractual relation between the parties—their minds never met. Plaintiff's mind was in warehouse "A," defendant's in warehouse "D." There being no mutual obligations, defendant owed plaintiff no duty, either to write a policy on the goods in warehouse "A" or anywhere else.

Plaintiff's claim and argument proceed upon the fundamental fallacy that defendant was obligated to hear the message through the receiver of his telephone instrument exactly as it was spoken into the telephone instrument at Kressman's end of the wire. Such a legal obligation on telephone users could hardly be

viewed with equanimity, in the light of the general experience of all of us with telephones.

Plaintiff having given the order in one way and defendant having received it in a different way, defendant was guilty of no negligence in executing the order as he received it. The judgment is reversed and judgment of *nil capiat* is entered in this court.

Judgment reversed and judgment here.

C. S. Warnock, Appellee, v. William J. Fleming, Appellant.

Gen. No. 22,296.

1. EVIDENCE, § 134*—*when proof of loss of instrument in suit sufficient to admit secondary evidence.* In an action on a bank check, evidence of the loss of the check examined and *held* sufficient to render secondary evidence competent.

2. BILLS AND NOTES, § 472*—*what measure of recovery in action on check payable in foreign or depreciated currency.* When an action is brought on a check payable in a foreign or depreciated currency, the measure of damages is the value of such foreign or depreciated currency at the time the check should have been paid, with interest to the time of judgment.

3. APPEAL AND ERROR, § 1471*—*when admission of parol evidence harmless.* Where the judgment would be proper without parol evidence as to the transaction, the admission of such evidence to explain the instrument on which the action is brought is harmless.

4. EVIDENCE, § 327*—*when parol evidence admissible to show character of transaction.* In an action on a check, where the check does not purport to express the entire contract or agreement between the parties, parol evidence is admissible to show the character of the transaction and intention of the parties.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed June 26, 1916. Rehearing denied July 7, 1916. *Certiorari* denied by Supreme Court (making opinion final).

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

PATTISON & SHAW, for appellant; DOUGLAS C. GREGG, of counsel.

ELA, GROVER & MARCH, for appellee; MORTIMER C. GROVER, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit on a bank check drawn by defendant to the order of and delivered to plaintiff. Upon trial plaintiff offered proof of the loss of the original check, with secondary evidence thereof. He had judgment for $6,658.75. Defendant, appealing, says that there was not sufficient proof upon the trial that the original check had been lost.

The check was drawn in Tampico, Mexico, and plaintiff proved that the check was given to the judge in the Court of First Instance in Tampico, Mexico; that he had never indorsed the check or transferred it to anybody by assignment or otherwise; that the check was forwarded to the governor at Victoria to have the defendant's signature recognized; that plaintiff had not seen the check since that time; that the last time he had seen it was in the Court of First Instance; that he had made a diligent effort to find it, had searched for it both at Tampico in the court records and at Victoria, and had spoken to the judge concerning it, and that he had had other parties search for it, but had been unable to find it. The defendant, testifying, identified the copy received in evidence as being a true and correct copy of the check. We think these circumstances met the requirement of proof of loss and made competent secondary evidence. *Case v. Lyman,* 66 Ill. 229; *McMillan v. Bethold, Smith & Co.,* 35 Ill. 250.

The check was drawn on a firm of bankers in Tampico and called for the payment of 10,500 pesos, which is Mexican money. The judgment in our court was for an amount in money of the United States equivalent

to the value of 10,500 pesos at the time the check was presented for payment. It was admitted that at the time the check was presented the value of a Mexican peso was 50 cents in United States money, while at the time of the trial its value was only 19 cents of our money, it having in the meantime depreciated for reasons which are known to all. This difference really represents the substance of the dispute between the parties, for defendant contends that judgment should be entered in United States money only in an amount based upon the value of the Mexican peso at the date of the trial. With this contention we cannot agree. In Daniel on Negotiable Instruments, vol. 2, page 1760, it is said:

"A check is a draft or order upon a bank or bankinghouse, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand."

This definition has been approvingly referred to in many cases, including *Ridgely Nat. Bank v. Patton & Hamilton*, 109 Ill. 479. See list of cases in 7 Cyc. 529.

The check under consideration was presented for payment the day after it was drawn but payment was refused, as defendant had stopped its payment from motives apparently malicious but which are not material here. Under the rule above quoted the check should have been paid when presented, and the breach occurred when plaintiff presented the check and it was refused.

It is established by many decisions that when suit is brought upon a check or other obligation payable in a foreign or depreciated currency, the measure of damages is the value of such foreign or depreciated currency at the time such check or other obligation should have been paid, with interest to the time of judgment. Among the many cases so holding are the earlier cases

in this State of *Smith v. Dunlap,* 12 Ill. 184; *McCumber v. Gilman,* 13 Ill. 543; and *County of Madison v. Bartlett,* 1 Ill. 67, which have never been overruled. Other decisions are *Grunwald v. Freese,* 34 Pac. 73 (Cal.); *Butler v. Merchant* (Tex. Civ. App.), 27 S. W. 193; *Stewart v. Salaman,* 94 U. S. 434; and *Matthews v. Rucker,* 41 Tex. 636. See also, long list of cases to the same effect in 30 Cyc., p. 1217 and 8 Cyc., p. 328. We are not persuaded by the argument of counsel for defendant to depart from the rule announced in these cases.

It is said that the trial court was in error in admitting parol testimony to explain the check. There are two answers: (1) The judgment would be proper without any parol testimony as to the transaction; (2) the check does not purport to express the entire contract or agreement between the parties, hence parol evidence was admissible to show the character of the transaction and intention of the parties, and such evidence was not inconsistent with the check. The rule is so stated in Daniel on Negotiable Instruments, vol. 1, p. 127; 17 Cyc. 718; and in *Saffer v. Lambert,* 111 Ill. App. 410; and *Ebert v. Arends,* 190 Ill. 221.

There appearing no convincing reason for disturbing the judgment, it is affirmed.

Affirmed.

Wendell S. Merrick, Plaintiff in Error, v. T. A. Rooney, Defendant in Error.

Gen. No. 22,210.

CONTRACTS, § 380*—*when parol evidence admissible to show real consideration.* Parol evidence is admissible to show that the earnest money actually paid upon the execution of a contract to convey realty was in a different amount than that recited in the contract.

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed June 26, 1916.

WILLIAM ENGLISH, for plaintiff in error.

AUSTIN J. ROONEY, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The parties to the litigation entered into a written contract, by which defendant agreed to sell certain real estate to plaintiff. The plaintiff, after signing and delivering the contract, declined to complete the purchase. The reason for his action in so refusing is of no consequence, as neither the issues nor the proofs call it in question.

James Carroll was the agent who negotiated the transaction and procured plaintiff to execute the contract. The contract recites that plaintiff paid five hundred dollars as earnest money to be applied on the purchase price when the sale was consummated. It further provided that if the title proved defective and plaintiff did not for that reason complete the purchase, the earnest money should be returned to him. The earnest money and the contract were to be held in escrow by John A. Carroll & Brother for the mutual

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

benefit of the parties. When Carroll presented the contract to plaintiff for execution by him he declined to pay as earnest money five hundred dollars, but was willing to pay one hundred dollars, and did pay the one hundred dollars, which Carroll accepted, but failed to change the contract in this regard. These facts are not in dispute.

Plaintiff brings this action to recover four hundred dollars as due him in virtue of the contract as unpaid earnest money, which the contract provides shall be forfeited as liquidated damages on defendant's refusal to carry out the contract on his part. There was a trial before court and jury, which resulted in a verdict and judgment in favor of defendant, and plaintiff is here asking a reversal.

Plaintiff requested the court to instruct the jury to find a verdict in his favor for four hundred dollars, which the trial judge declined to do, but instructed the jury that if they believed from the evidence "that at the time the said contract was signed that it was agreed by and between the parties to this litigation that the sum to be paid as earnest money or liquidated damages was one hundred dollars, then and in that event the jury should find the issues for the defendant." Under this instruction and the proofs, the jury had no alternative than to bring in a verdict for defendant.

Plaintiff's rights are restricted to the terms of the contract. In virtue of that contract he seeks to recover the amount of the earnest money recited in the contract to have been paid to the agents. Neither in the statement of claim nor in the evidence given thereunder upon the trial is there stated or proven such facts as entitle plaintiff to recover from defendant the amount of the earnest money recited in the contract to have been paid. The fact that one hundred dollars only was paid, and that not to defendant but to the

agents, defeats the action set forth in the statement of claim.

We think the conceded fact that one hundred dollars was paid as earnest money and not five hundred dollars, as recited in the contract, was susceptible of proof by parol, without violating any rule against the varying or altering of written contracts by parol proof. The actual consideration for a deed or contract for the conveyance of real estate is always open to proof by parol. The expressed consideration in the writing is not conclusive; it is in the nature of a receipt for money which may be explained by parol whenever the amount actually paid is disputed. In *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, the court say: "It has been held in many cases in this State, and is the settled law, that the recital of a given consideration may be contradicted by parol evidence for all purposes except to destroy the legal effect of the instrument." And again the court say in *Koch v. Roth*, 150 Ill. 212: "It is well settled, however, that the recital of a consideration in a deed or bill of sale is not conclusive upon either party; and that it may be shown by parol what the true amount of the consideration is, and how it is to be paid." We have been cited to no cases holding to the contrary, and we know of none. Certainly *Schreiber v. Straus*, 147 Ill. App. 581, does not hold to the contrary of the doctrine above announced, for the question of the amount of the consideration expressed in the Schreiber contract was not involved.

The judgment of the Municipal Court is without error and is therefore affirmed.

Affirmed.

Salvatore de Salvo, Defendant in Error, v. Arthur E. Anderson, Plaintiff in Error.

Gen. No. 22,237. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the March term, 1916. Reversed with judgment of *nil capiat*. Opinion filed June 26, 1916.

Statement of the Case.

Action by Salvatore de Salvo, plaintiff, against Arthur E. Anderson, defendant, to recover earnest money paid under a contract for the purchase of real estate. to reverse a judgment of $500 for plaintiff, defendant prosecutes this writ of error. Plaintiff did not join in error or argue the cause.

It appeared from the evidence that defendant and plaintiff entered into a contract for the sale by defendant to plaintiff of certain real estate. The consideration recited in the contract to be paid by plaintiff was $7,250. The contract also recited that $500 was paid as earnest money, and that on the passing of the conveyance and closing of the transaction the remaining sum due on the purchase price was to be liquidated by the payment by plaintiff to defendant of $1,000 in money and the giving of a first mortgage for $4,000 and a second mortgage for $1,750, secured upon the premises sold. The contract and earnest money were to be held by Navigato Savings Bank in escrow for the benefit of both parties to the contract. James R. Navigato, of the bank bearing his name, was the agent who negotiated the sale and procured the contract to be signed by the parties to it.

Plaintiff refused to carry out the contract and demanded the return of the earnest money on the contention that he had been induced to sign the contract

to purchase the property by false and fraudulent representations made to him by James R. Navigato and the defendant. The representations alleged to have been false concerned taxes for the year 1913, which plaintiff claimed should have been prorated from January 1, 1913, to the date of the closing of the transaction, and which would amount to about $80 in favor of plaintiff; and the further representation that there would be no extra charge for a mortgage of $5,750, whereas, it was claimed, an expense in this regard amounting to $150 was to be paid.

It seemed that plaintiff was by birth an Italian and had at the time of the transaction lived in this country ten years. He claimed that he did not understand the English language. Navigato, who procured plaintiff's signature to the contract, spoke the Italian language, and it was in evidence that at the time the contract was signed the parties present spoke in Italian and not in English. Plaintiff paid the earnest money to Navigato and not to defendant, and he paid it at the instance of Navigato at the time he signed the contract.

Defendant did not speak Italian at the signing of the contract and it did not appear that he could speak that language. It was not claimed that defendant made any representation to plaintiff which induced him to sign the contract nor any statement in relation to it or its terms contrary to such terms. Nor did it appear that plaintiff interrogated defendant regarding the terms of the contract.

JOHN E. ANDERSON and GEORGE COHEN, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. VENDOR AND PURCHASER, § 355*—*when evidence insufficient to show false representations in procuring execution of contract.* In an action to recover earnest money paid under a contract for the purchase of real estate, evidence examined and *held* insufficient to show that the execution of the contract was procured by false and fraudulent representations.

2. VENDOR AND PURCHASER, § 38*—*what insufficient to constitute fraudulent representations.* In an action to recover earnest money paid under a contract for the purchase of real estate, representations as to the taxes on the property and as to the expense of the purchase money mortgages to be placed thereon, *held* to be rather in the nature of promises to be carried out in the future than representations of existent facts and therefore not to constitute fraud, though the contract was entered into in reliance upon such representations.

3. FRAUD, § 112*—*what essential to establish.* A mere allegation of fraud is insufficient, but it must be proven, and the acts or things done which in law constitute fraud must be proven by a preponderance of the evidence.

4. FRAUD, § 87*—*when not presumed.* Fraud is never presumed, and when transactions may be fairly reconciled with honesty and the weight of the evidence favors an honest motive, the conclusion of integrity should be adopted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John H. Lawrence and Edward F. Lawrence, trading as Lawrence Brothers, Appellants, v. William Wendnagel and Charles M. E. Wendnagel, trading as Wendnagel & Company, Appellees.

Gen. No. 22,271. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1916. Affirmed. Opinion filed June 26, 1916.

Statement of the Case.

Action in debt by John H. Lawrence and Edward F. Lawrence, trading as Lawrence Brothers, plaintiffs, against William Wendnagel and Charles M. E. Wendnagel, trading as Wendnagel & Company, defendants, to recover on an indemnity bond. From a judgment of *nil capiat* and for costs in a trial before the Municipal Court without the intervention of a jury, plaintiffs appeal.

The facts involved were that defendants had a contract with plaintiffs for certain structural steel work, under which plaintiffs were authorized to retain out of any moneys due defendants at any time sufficient to indemnify plaintiffs against any claim or lien for which they or their property might be liable. On November 24, 1911, one David O'Keefe threatened a suit at law against plaintiffs for personal injuries claimed to have been suffered in and about the erection by defendants of the structural steel work for plaintiffs. Plaintiffs claimed the right to retain about $4,000 due defendants to await the result of O'Keefe's threatened suit. Defendants not only denied liability, but also the right of plaintiffs to retain the money then due them. This controversy was settled by defendants giving to plaintiffs a bond of indemnity in the penalty of $4,000, conditioned that defendants should hold plaintiffs harmless

from and against all liability for personal injuries sustained by any and all persons as the result of the carelessness or negligence of defendants, their agents or employees, in and about the performance by defendants of their contract with plaintiffs, agreeing to pay plaintiffs "all damages resulting or arising from such negligence, which may hereafter be assessed against them in any action brought by any such person or persons, then this obligation to be void," etc. O'Keefe sued plaintiffs for damages for the personal injury which he claimed he suffered, and plaintiffs defended the suit successfully and brought this suit in debt, upon the indemnity bond hereinbefore referred to, to recover from defendants, attorney's fees, witness fees, and other expenses paid by plaintiffs in their defense of the O'Keefe suit, with interest upon all of such disbursements. The attorney of defendants assisted in the defense of the O'Keefe suit by advising plaintiffs' attorneys regarding the pleadings and, at one time, as to the advisability of procuring a continuance, also as to the advisability of employing additional counsel to help in the trial of the case and the propriety of procuring medical testimony on the theory that O'Keefe was malingering. Defendants' attorney was also present at the trial, although he took no active part in it. It also appeared that in a motion to instruct a verdict for plaintiffs in the present suit (defendants in the O'Keefe suit), the name of defendants' attorney was coupled with those of plaintiffs' attorneys.

BURTON, KANNALLY & MEGAN, for appellants.

EDMUND W. FROEHLICH, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. INDEMNITY—*when terms of original contract waived by acceptance of indemnity.* Where a contract for construction authorizes persons letting it to retain out of any moneys due the contractors a sufficient amount to indemnify the former against any claim or lien for which they or their property may be liable, and on a threat by an employee of suit for personal injuries the contractors give to those letting the contract an indemnity bond to hold the latter free from liability, *held* that the contract between the parties and the bond of indemnity constitute different transactions, the contract being satisfied upon the payment and acceptance of the amount due thereunder, and the terms of the contract provided for the retention of money being waived by the acceptance of the indemnity bond.

2. INDEMNITY, § 9*—*how indemnity bond construed.* Nothing can be read into an indemnity bond which does not actually appear in it or which is not warranted by legal interpretation of the language used to express the intention of the parties, which intention must be gathered from such language.

3. INDEMNITY, § 9*—*when indemnity bond not construed as covering liability for attorneys' fees and expenses.* Where the covenant of an indemnity bond is limited to "all damages resulting or arising from such negligence which may hereafter be assessed against them in any action brought by any such person or persons," and in the suit in which the bond is given no damages are recovered, the terms of the bond cannot be construed to hold defendant in the action liable for the attorneys' fees and the expenses attendant upon the suit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois ex rel. William M. Webster, Appellant, v. City of Chicago et al., Appellees.

Gen. No. 22,518.

1. MUNICIPAL CORPORATIONS—*when duty of removing ashes not imposed upon the city.* The duty of removing ashes is not primarily the duty of the city, but of the property owner, upon whom is imposed the expense of such removal irrespective of ordinance.

2. MUNICIPAL CORPORATIONS—*when city authorized to regulate removal of ashes.* A municipal corporation acts within its powers in legislating upon the subject of the removal of ashes.

3. MUNICIPAL CORPORATIONS—*what is extent of duty of city as to removal of ashes.* When a municipal corporation undertakes the burden of removing ashes from certain classes of buildings, its duty in this regard is limited by the restrictions of the ordinance to the class of buildings designated by the ordinance.

4. MUNICIPAL CORPORATIONS, § 1192*—*what is limit of levy of tax for removal of ashes.* When a city levies a tax on real property for the removal of ashes, it must be assumed that it limits the amount of the levy to the cost of removing ashes from the buildings specified in the ordinance and no others.

5. MUNICIPAL CORPORATIONS—*when city not liable for cost of removal of ashes.* The primary duty of the removal of ashes being upon the property owner and not the city, by levying and collecting a tax sufficient only to pay for the removal of such ashes as the city has by its ordinance assumed to remove at the expense of the taxpayers, the city does not thereby become chargeable with the duty of removing ashes from all buildings without limitation or discrimination.

6. MUNICIPAL CORPORATIONS—*when city not liable for cost of removing ashes. Held,* following 272 Ill. 451, that by levying and collecting the tax in question, the city did not become liable for the cost of removing ashes from all residence property therein.

Appeal from the Circuit Court of Cook county; the Hon. JOHN H. FORNOFF, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed June 26, 1916. Rehearing denied July 1, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

THOMAS S. MCCLELLAND, for appellant.

RICHARD S. FOLSOM, for appellees; LEON HORNSTEIN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This appeal comes to this court by transfer from the Supreme Court of the State, which held that it was without jurisdiction for the reason that the validity of the ordinances challenged was not necessary to the decision of the case. All of the facts and the rulings of the Supreme Court thereon appear in 272 Ill. 451, in an opinion by Mr. Chief Justice Farmer. It would be a work of supererogation, which neither theology nor law tolerates, to again state the case, which might be imperfectly done, and therefore we are content to simply refer to the Supreme Court's opinion for all that is there so well stated and decided.

As we understand the opinion of the Supreme Court, it is left to this court to decide "whether the City of Chicago has by its acts in levying and collecting a tax to remove ashes and in expending such tax in removing them from some premises but not from all, imposed upon it the legal duty and obligation to remove ashes from all residence property in the city."

In considering the question it must be borne in mind that the duty of removing ashes is not primarily the duty of the city, but of the property owner, and that the expense of such removal is imposed by law upon the property owner without regard to the ordinance. The city having the right to legislate upon the subject of the removal of ashes, when it undertook by ordinance to regulate such removal, was acting squarely within its powers. Not being compelled by law to remove any ashes, when it undertook the burden of removing ashes from certain classes or types of build-

ings, its duty in this regard was limited by the restrictions of the ordinance to the class of buildings designated by such ordinance.

The relator's type of building is, admittedly, not within the class of buildings from which the city assumed the duty of removing ashes. When the city levied a tax on real property for the removal of ashes, it must be assumed that it limited the amount of the levy to the cost of removing ashes from the buildings specified in the ordinance and no others, and in view of the decision of the Supreme Court in this case, *supra,* and *California Reduction Co. v. Sanitary Reduction Works,* 199 U. S. 306, cited as sustaining authority that the primary duty rested upon the owner and not the city to remove ashes at such owner's expense, we are unable to say that by the levying and collecting of a tax sufficient only to pay for the removal of such ashes as the city had by its ordinance assumed to remove at the expense of the taxpayers, it thereby became chargeable with the duty of removing ashes from all buildings without limitation or discrimination.

We are of the opinion that the levying and collecting of the tax above referred to did not impose upon the city the legal duty or obligation to remove ashes from all residence property in the city; consequently that the demurrer interposed by the city to the relator's petition for a writ of mandamus was properly sustained, and the judgment of the Circuit Court is therefore affirmed.

Affirmed.

Michael J. Flynn, City Treasurer, Appellee, v. Southern Surety Company, National Surety Company and United States Fidelity & Guaranty Company, also Appellees, and William C. Niblack, Receiver, Appellant.

Gen. No. 22,506. (Not to be reported in full.)

Appeal from interlocutory order of the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed July 19, 1916.

Statement of the Case.

Bill by Michael J. Flynn, City Treasurer of the City of Chicago, complainant, against Southern Surety Company, National Surety Company, United States Fidelity & Guaranty Company and William C. Niblack, as receiver of the La Salle Street Trust & Savings Bank, defendants. From an order of the Superior Court appointing a receiver of certain securities held by the complainant, defendant Niblack appeals.

It appeared that the complainant, as city treasurer, had on deposit with the La Salle Street Trust & Savings Bank certain funds belonging to the City of Chicago, to secure the repayment of which from time to time, the Southern Surety Company, National Surety Company, the United States Fidelity & Guaranty Company, Massachusetts Bonding & Insurance Company, Equitable Surety Company, Illinois Surety Company, Globe Indemnity Company and the American Fidelity Company had executed certain bonds as sureties. May 9, 1914, the city demanded further security to insure the return of the city's funds deposited with the bank, which at that time amounted to some $650,000. In compliance with this request, the vice president of the bank turned over to the complainant bonds

and other securities aggregating in value about $280,000. June 12, 1914, the bank closed its doors. June 18, 1914, a bill was filed in the Circuit Court for the purpose of winding up the bank, and a receiver was appointed the following day. The treasurer thereupon demanded of the sureties on the bank's bond a return of the full amount of the $650,000.

The Southern Surety Company filed its bill against the City of Chicago, the bank, its receiver, and the other sureties on its bonds, in which it set up the giving of the bonds by the bank, its own liability as surety, and the receipt of securities by the city treasurer.

It offered to pay the City of Chicago the maximum amount for which it was responsible, and asked that it be subrogated to the rights of the city to a proportionate part of the securities. To this bill answers were filed by the city, the receiver for the bank, and all sureties on its bonds except the American Fidelity Company, which filed a demurrer. The receiver of the bank filed his cross-bill July 17, 1915, and an amended cross-bill March 22, 1916, in which he prayed that Michael J. Flynn, city treasurer, might be required to deliver to him all the securities in question.

July 28, 1914, Michael J. Flynn filed an original bill in the Superior Court, in which he set up the matters already stated in regard to the deposit of funds with the bank, the taking of indemnifying bonds, the obtaining of additional securities, and the subsequent failure of the bank; also that the various surety companies set up a right to be subrogated to the city's interest in the securities and that the bank and its receiver claimed an interest in the same. He asked that the court decree that the bank or its receiver pay whatever sum might be due him as city treasurer; that, in default, he be directed to sell the collateral, apply the proceeds on the balance of the indebtedness due the City of Chicago from the bank, and make disposition of the surplus, if any, to such parties and in such

amounts as might be determined by the court. This bill made the Southern Surety Company and the other sureties on the bank's bonds parties defendant, as well as the receiver for the bank.

Answers were duly filed, and in this suit also, the receiver filed a cross-bill containing the same allegations and prayer for relief as were set out in his cross-bill filed in the case of *Southern Surety Company v. City of Chicago*. March 16, 1916, Flynn, by leave of court, amended his bill by inserting a prayer for the appointment of a receiver *pendente lite*. To this amendment was attached the affidavit of one Keefe, first assistant treasurer, in which he stated that Flynn was no longer city treasurer, but had been succeeded by one Sergel. Thereafter, on March 22, 1916, an order was entered consolidating the two cases under the name of *Michael J. Flynn, City Treasurer, v. Southern Surety Company et al.* April 5, 1916, on motion of complainant Flynn and various defendant surety companies, an order was entered appointing a receiver.

HIRAM T. GILBERT, for appellant.

E. W. AUSTIN, J. H. HUCKLEBERRY, A. G. MOSELEY, JUDAH, WILLARD, WOLF & REICHMANN, MOSES, ROSENTHAL & KENNEDY, SHEPARD, MCCORMICK, THOMASON, KIRKLAND & PATTERSON, CHARLES H. BURRAS and FYFFE, RYNER & DALE, for appellees.

MR. JUSTICE GOODWIN delivered the opinion of the court.

Abstract of the Decision.

1. RECEIVERS, § 5*—*when appointment pendente lite proper.* Where during the pendency of a suit to determine the ownership of securities in the hands of a public official, such official's term of office expires, the appointment of a receiver *pendente lite* for such securities is proper for the protection of the rights of the parties.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Flynn v. Southern Surety Co. et al., 200 Ill. App. 38.

2. RECEIVERS, § 12*—*when bond from receiver pendente lite not necessary.* Where the parties moving for the appointment of a receiver *pendente lite* to hold certain securities, the title to which is involved in a suit, are not seeking to take the custody from a party claiming the title or interest in the securities but the custodian is one of the moving parties, the appointment of the receiver without requiring the moving parties to give a bond is not erroneous.

3. RECEIVERS, § 6*—*when Superior Court has constitutional jurisdiction to appoint.* The Superior Court of Cook county has constitutional jurisdiction of a controversy between the receiver of an insolvent bank and the creditors of such bank, involving the title to securities delivered by the bank's officers to one of such creditors before the closing of the bank's doors.

4. APPEAL AND ERROR, § 408*—*when question of jurisdiction arises too late.* Where the controversy is one within the constitutional jurisdiction of a court, and its jurisdiction of a particular controversy is first questioned on appeal by one who answered the original bill and filed a cross-bill asking affirmative relief, such jurisdictional question comes too late.

5. RECEIVERS, § 6*—*when appointment within jurisdiction of court making it.* The fact that the proceedings for the winding up of a bank are pending in the Circuit Court does not deprive the Superior Court of jurisdiction to appoint a receiver for certain securities delivered by such bank to one of its creditors before the winding up proceedings, in a proceeding between the receiver of the bank and certain creditors to determine the title to such securities.

6. RECEIVERS, § 6*—*when appointment proper pendente lite.* Even though the jurisdiction of a court to appoint a receiver *pendente lite* of certain property is properly questioned, it is the duty of such court to protect the subject-matter of the litigation until the jurisdictional question can be properly decided.

7. RECEIVERS, § 5*—*when appointment pendente lite proper.* Where, pending a proceeding to determine title to certain securities as between the receiver of a debtor and certain creditors, the term of office of the public official holding such securities terminates, the court may, on motion of such custodian and other creditors, appoint a receiver for such securities *pendente lite* without determining first the title to the securities as between the parties.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Armin W. Brand et al., Appellants, v. John H. F. Rueter et al., Appellees.

Gen. No. 21,322. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed July 20, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Armin W. Brand and others, complainants, against John H. F. Rueter and others, defendants, to foreclose a trust deed to secure his four notes dated September 1, 1892, one for $5,000 and three for $1,000 each. From a decree dismissing the amended bill for want of equity, complainants appeal.

It appeared that by extension the notes matured September 1, 1900. The semiannual interest of $280 was paid regularly up to September 1, 1899. On March 1, 1900, $80 was paid and credited. On February 2, 1902, $8,000 was paid and applied, first, to liquidate the accrued interest on all the notes to that date, next, to the payment of the note for $5,000 and one note for $1,000, and then to the reduction of the other two notes to $635 each.

After a request for interest in the fall of 1902, Rueter, in December or January following, gave the agent of complainant Brand, holder of the notes, a note for $50 of a third person payable to the order of and indorsed by Rueter, which was collected on February 6, 1903, and credited of that date, of which Rueter was notified. The record disclosed no agreement to accept the note as payment of any part of the debt, and no circumstances that raised a presumption that it was so taken.

Rueter borrowed the money to improve one of the

lots conveyed by the trust deed. He applied to one Blumenthal, a mortgage broker, for the loan, and agreed to pay him a commission of two and one-half per cent. and the expenses connected therewith, such as examining abstract, recording, etc. The latter submitted it to one Michael Brand, who looked over the property, accepted the security, and gave Blumenthal his check for the amount of the loan, $8,000. Blumenthal deducted therefrom $200 for his commission and paid out the balance to Rueter's contractor on Rueter's orders. Rueter requested Blumenthal to get an extension of time as aforesaid on the notes, which was done and for which he paid Blumenthal another commission of $200. No part of either commission was received by the lender, Brand. During the year 1892, Blumenthal made other loans for said Brand and he collected the interest on the notes in question while said Brand owned them. They became the property of complainant Armin W. Brand, in 1899, after which the payments thereon were made to the latter's agent. Neither the lender nor subsequent owners of the notes received or agreed to receive more than the legal rate of interest thereon. The compensation paid to Blumenthal for negotiating the loan and procuring an extension of the time of payment was according to contract between him and his borrower, with which the lender had no connection and of which he had no knowledge.

Evidence was received tending to show that Blumenthal had not taken out a license as required by the ordinances of the City of Chicago. There was also evidence that the notes were signed September 3, 1892, and dated September 1, 1892, and that the original loan was not paid over to Blumenthal until November 10, 1892, but that the interest was paid thereon from the date of the note. The record did not disclose whether the lender held the money for Rueter's use from the date of the note. The arrangement between him and

the lender in that respect was not shown. Brand agreed to make the loan before September 1st.

JAMES H. HOOD, for appellants.

JAMES A. PETERSON, for appellees.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. PAYMENT, § 15*—*when application of payment proper.* An application of payment to liquidate accrued interest on notes to the date when made, and thereafter to the payment of the principal of the notes, is proper especially in the absence of any direction by the debtor.

2. PAYMENT, § 6*—*when note of third person a conditional payment.* Where a debtor gives a note of a third person, in the absence of any agreement that such note be accepted as payment of any part of the debt and of circumstances raising a presumption that it was so taken, the giving of the note will be deemed conditional payment only, and as of the date when it is collected.

3. LIMITATION OF ACTIONS, § 23*—*when statute commences to run in action on note.* In an action on a note where the debtor gives the note of a third person in payment of the note in suit, the note of such third person being deemed conditional payment only and of the date of its collection, the running of the statute of limitations is regulated by the date of the payment of such third person's note.

4. USURY, § 5*—*when evidence insufficient to show usury.* In an action to foreclose a trust deed secured by promissory notes, evidence examined and *held* insufficient to show usury.

5. MORTGAGES, § 503*—*when evidence as to want of license inadmissible.* In an action to foreclose a trust deed executed to secure promissory notes, evidence as to whether or not the intermediary securing the loan evidenced by such note was licensed in accordance with city ordinance, *held* irrelevant.

6. USURY, § 53*—*when burden of proof on debtor.* Where in an action to foreclose a mortgage secured by notes the defense of usury is set up, the burden of proving usury is on the debtor.

7. USURY, § 32*—*when usury not a defense.* In a suit to foreclose a trust deed executed to secure promissory notes where the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

interest, if usurious, was paid before maturity and before the transfer of the notes to the holder bringing the suit thereon, the defense of usury is not available.

James J. Ryan, Appellee, v. Chicago Foundry Company, Appellant.

Gen. No. 21,398. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Assumpsit by James J. Ryan, plaintiff, against Chicago Foundry Company, a corporation, defendant, based upon an award made for plaintiff against defendant under the Workman's Compensation Act of 1911 (J. & A. ¶ 5449 *et seq.*), which was signed by only two of the three arbitrators appointed thereunder. From a judgment for plaintiff, defendant appeals.

EASTMAN & WHITE, for appellant.

GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT—*when award signed by two of three arbitrators sufficient.* Under section 10 of the Workmen's Compensation Act (J. & A. ¶ 5459), and section 1 of the act as to

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

statutory construction (J. & A. ¶ 11102), an award of the arbitrators which is signed by only two of the three arbitrators appointed under the Workmen's Compensation Act is valid.

2. COURTS, § 100*—*when County Court has jurisdiction of assumpsit on award.* The County Court has jurisdiction of a suit in assumpsit based on an award for less than $1,000.

3. ASSUMPSIT, ACTION OF, § 6*—*when proper remedy on an award.* Assumpsit is a proper remedy on an award.

4. WORKMEN'S COMPENSATION ACT—*when evidence as to liability of employer properly excluded in assumpsit on award.* In a suit in assumpsit based on an award made under the Workmen's Compensation Act (J. & A. ¶ 5449 *et seq.*), evidence bearing on the question of defendant's liability under such act is properly excluded as irrelevant.

The People of the State of Illinois, Defendant in Error, v. Abraham Glick, Plaintiff in Error.

Gen. No. 21,598. (Not to be reported in full.)

Error to the Criminal Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed July 20, 1916.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Abraham Glick, defendant, on an indictment for larceny and receiving stolen property, the value of which exceeded fifteen dollars. Defendant pleaded not guilty and the case proceeded to trial. There appearing to be a variance, the State's Attorney asked for a continuance and the defendant for his discharge. The court suggested a plea to a misdemeanor if the defendant was "willing to take a chance to take a year in the House of Correction." At the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

conclusion of some discussion between the judge and the counsel, the attorney for defendant remarked: "I think the best thing, your Honor, will be to withdraw the jury." Thereupon without further remarks the court said: "On motion of the defendant, the jury withdrawn and the defendant's plea of not guilty withdrawn and the defendant's plea of guilty entered, and the defendant warned and sentenced to the House of Correction for one year and fined one hundred dollars and costs."

B. M. SHAFFNER and EBBSTEIN & MACAULAY, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CRIMINAL LAW—*when explanation of consequence of plea of guilty insufficient.* On an indictment for larceny and receiving stolen property, the explanation by the court of the consequence of a plea of guilty, *held* not a sufficient compliance with section 4, div. 13, of the Criminal Code (J. & A. ¶ 4121).

2. CRIMINAL LAW, § 102*—*when entry of plea of guilty improper.* On an indictment for larceny and receiving stolen property, a plea of guilty is improperly entered where no explanation was made by the court of the consequences of the plea and no witness was examined as to the aggravation or mitigation of the offense.

3. CRIMINAL LAW, § 462*—*when record will not prevail against bill of exceptions.* On a writ of error to reverse a judgment on an indictment for larceny and receiving stolen property, the record as made by the clerk will not prevail against what is shown in opposition to it in the bill of exceptions, even though the record shows a compliance with the statute.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Old Rose Distilling Company, Defendant in Error, v. Elizabeth Parkhill, Plaintiff in Error.

Gen. No. 21,257. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JACOB HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Forcible entry and detainer by Old Rose Distilling Company, a corporation, plaintiff, against Elizabeth Parkhill, defendant, for the possession of certain premises, plaintiff's right of possession being based upon a lease entered into with one McGivern, the owner thereof. The court having found the issues for the plaintiff, and having entered judgment thereon, defendant prosecutes this writ of error.

This suit was the aftermath of a similar proceeding for the possession of the same premises, brought by the said McGivern against the defendant, wherein the court also found against the defendant, which judgment was later affirmed by this court upon a writ of error. *McGivern v. Parkhill,* 195 Ill. App. 343.

It was urged that during the pendency of the writ of error in *McGivern v. Parkhill, supra,* the present action should have been abated.

JOHN M. GRIMES, for plaintiff in error.

CHARLES W. STIEFEL, for defendant in error.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR—*when question of abatement of action raised too late.* The objection that an action involving the possession of premises should have been abated during the pendency of a writ of error in a similar proceeding for the possession of the same premises, brought by another plaintiff against the defendant, is raised too late when first raised on appeal.

2. ABATEMENT AND REVIVAL, § 39*—*when pendency of writ of error not available to abate similar action.* The pendency of a writ of error cannot be invoked to abate another similar action unless the former operates as a *supersedeas.*

3. PARTIES, § 31*—*when substitution does not constitute new cause of action.* Where a wife is made a joint defendant to an action of forcible entry and detainer originally brought against a husband, and thereafter the action is dismissed as to the husband and the case proceeds against the wife alone, such substitution of parties does not constitute a new cause of action.

Mary Hoeft, Defendant in Error, v. John Hoeft, Plaintiff in Error.

Gen. No. 21,361. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES M. WALKER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Bill for divorce by Mary Hoeft, complainant, against John Hoeft, defendant.

On July 15, 1911, complainant was granted a default

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

decree of divorce on the ground of desertion. On the day the said decree was entered, defendant presented a motion to set aside the decree and for leave to file his answer, which said motion was entered of record and continued. On March 4, 1912, defendant presented his sworn answer to the bill and an affidavit in support of said motion. The court overruled said motion, and to review this action of the court, this writ of error has been prosecuted.

It was contended by defendant that the court, in overruling said motion, abused its discretion, defendant claiming that his affidavit and sworn answer set forth a meritorious defense to complainant's bill.

The answer filed by defendant denied the wilful desertion and its continuance without reasonable cause, as set forth in the bill. Said answer admitted that defendant had been living separate and apart from the complainant from the date of desertion alleged in the bill (November 4, 1907) to March 4, 1912, the date the affidavit and answer were presented and the motion denied. Defendant, in his answer, contended that his absence was justified because complainant had caused his arrest on a charge of disorderly conduct; that when that suit was *nolle prossed*, the justice of the peace before whom it was pending warned him that complainant wanted him to stay away from her. Defendant's answer further alleged that prior to the desertion in question, complainant's adult sons had threatened to take his life if he did not leave the home of complainant, after which he did leave and stayed away for some time, believing that said threats would be carried out; that complainant knew of said threats, and consequently had her two sons arrested; that following his arrest of November 4, 1907, he feared a renewal of hostilities on the part of complainant's said adult sons; that because of the fear of these sons and the warning of the court, he stayed away.

GEORGE J. DREISKE, for plaintiff in error.

THEODORE A. KOLB, for defendant in error.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 10*—*when sufficient ground not shown for desertion.* The fact that a wife had caused the husband's arrest on a charge of disorderly conduct, and that when that action was *nolle prossed* the justice before whom it was pending warned the husband that the wife wished him to stay away from her, affords no justification for the husband's continued absence when the action of the justice was not shown to have been concurred in by the wife.

2. DIVORCE, § 10*—*when sufficient ground for desertion not shown.* The fact that the wife's adult sons threatened to kill the husband if he did not leave the wife's home cannot be attributed to the wife as an excuse for the desertion by the husband, where it is not shown that she aided and abetted in such threats, but it appears that she had her sons arrested in consequence thereof.

Edwin J. Bowes, Jr., et al., Appellants, v. Eugene S. Pike, Appellee.

Gen. No. 21,372. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded with directions. Opinion filed July 20, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Edwin J. Bowes, Jr., *et al.*, complainants, to restrain Eugene S. Pike, one of the defendants, from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

entering judgment upon a note for $1,250, dated February 1, 1908, due six months after date, with interest at the rate of six per cent. per annum from date. By stipulation, defendant Pike was permitted to file a cross-bill in said cause, wherein he prayed that a decree be rendered in his favor for the amount due him on the note in question. Allegretti, the other defendant, was dismissed from the suit by consent of the parties. Upon a hearing of the cause thus consolidated, the chancellor found the issues for the cross-complainant, and entered a decree in his favor for the sum of $1,776, being the amount then due on said note, and dismissed complainants' bill for want of equity. From this decree, complainants appeal.

MAYER, MEYER, AUSTRIAN & PLATT, for appellants.

MATZ, FISHER & BOYDEN, for appellee Eugene S. Pike; WILLIAM WARREN CASE, of counsel.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Abstract of the Decision.

1. BILLS AND NOTES, § 440*—*when evidence sufficient to show knowledge of payee of release of joint makers.* In an action by the makers of a note to enjoin the payee from entering judgment thereon, evidence examined and *held* to show that the payee had knowledge of an agreement by one of the makers to save the others harmless from liability thereon, and that such payee acquiesced therein.

2. BILLS AND NOTES, § 96*—*when extension of time releases joint makers.* Where the payee of a note enters into a binding contract with one of several makers thereof, extending the time of payment on the note without the knowledge or consent of the other makers, the latter are released from further liability.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harriette A. Ingraham et al., Executors and Trustees, Appellees, v. John W. Mariner and Lucinda W. Mariner, Executors, and J. Platt Underwood, Appellants.

Gen. No. 21,389. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Bill for an accounting by Harriette A. Ingraham, Henry V. Freeman and John F. Gilchrist, executors and trustees under the will of Granville S. Ingraham, deceased, complainants, against John W. and Lucinda W. Mariner, executors of the estate of Ephraim Mariner, deceased, and J. Platt Underwood, defendants. From a decree stating an account between the parties and making final disposition of the assets of their joint venture, defendants appeal.

As this case has been reviewed on several previous occasions, it is unnecessary to reiterate in detail the facts which are set forth in the following former opinions in the case: *Ingraham v. Mariner,* 194 Ill. 269; *Mariner v. Ingraham,* 127 Ill. App. 542, 550; 230 Ill. 130; 255 Ill. 108, aff'g 165 Ill. App. 200.

It was contended by defendants that under the contract of January 2, 1889, upon a sale of the property, interest on the $70,000 invested by plaintiffs' decedent in the joint enterprise should be included only for the purpose of determining the profits accruing therefrom, but that in the event of a loss, this interest item should be excluded; that as the decree of the chancellor included said interest item in determining the amount of the loss, it was erroneous in this respect.

The agreement of January 2, 1889, provided, in part, as follows:

"The said A. J. Cooper, of the 2nd part, being desirous of taking an interest in said land, agrees to make a loan of $30,000 (Thirty Thousand Dollars) at his own expense; also agrees to pay interest on said loan, and 6% on balance of Capital Stock to the said Granville S. Ingraham; the 6% on the balance is not required to be paid until the sale of said land; then that amount to be added to the Capital Stock.

* * * * * * * *

"The said Ingraham of the 1st part agrees to give to said Cooper of the 2nd part, half of the profits, after adding all expenses and interest to the $1,000 (one thousand dollars) per acre of said land."

The aforesaid contention of defendants was based upon the language of the contract hereinabove quoted, viewed in the light of the foregoing decisions in the case.

It was urged, by way of cross-error, that interest, from the date of sale, should have been allowed upon the principal amount of $48,971.09 found due from defendants to complainants. The contention of complainants was predicated upon section 2, ch. 74, Rev. St. (J. & A. ¶ 6691.)

LINES, SPOONER, ELLIS & QUARLES and SCOTT, BANCROFT & STEPHENS, for appellants.

WILLIAM K. OTIS, for appellees.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 201*—*when interest to be included in determining profits.* Where the language of a contract expressly provides that a certain interest item therein shall be included for the purpose of determining profits in the absence of any special provision

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

for the determination of losses, it must be held that the same basis of computation was intended to apply to the losses.

McGOORTY, J., dissenting.

2. CONTRACTS, § 201*—*how losses to be determined.* Loss is the antithesis of profit, and both are determined in the same manner unless otherwise provided in the contract.

3. COURTS, § 153*—*what effect given to dictum on subsequent appeal.* Though the statement of the Supreme Court on a former appeal as to a question not then before the court may be regarded as *dictum*, it will, nevertheless, on a subsequent appeal be taken by the Appellate Court as indicating the view of the Supreme Court on a point at that time, especially when not inconsistent with anything heretofore said in the case.

4. PARTNERSHIP, § 89*—*when advances by partners a firm obligation.* Advances by partners which cannot be repaid by reason of a deficiency in the assets are to be treated as a debt of the firm.

5. INTEREST, § 5*—*when interest not allowed on advances not repaid to partner.* Hurd's Rev. St., ch. 74, sec. 2 (J. & A. ¶ 6691), does not warrant the allowance of interest on an amount decreed to be due a partner for unpaid advances to the firm, the relationship of debtor and creditor not existing between such partners and the partner in whose favor the amount is decreed.

J. E. McCoy et al., Appellees, v. Acme Automatic Printing Company, Appellant.

Gen. No. 21,392. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Appeal dismissed. Opinion filed July 20, 1916.

Statement of the Case.

Motion to dismiss appeal as prematurely taken.

A. G. DICUS, for appellant.

BAKER & HOLDER, for appellees.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 269*—*when appeal prematurely taken.* Where at the time an appeal is taken there is pending before the trial court a motion to vacate the judgment from which it is taken, the judgment is not final, and the appeal is prematurely taken.

William H. Couch et al., on appeal of Mathaus Scherrer, Appellant, v. Lake Shore Building Loan & Homestead Association, Appellee.

Gen. No. 21,401.

BUILDING AND LOAN ASSOCIATIONS, § 76*—*when premiums on loans chargeable up to time of insolvency.* An insolvent building and loan association in calling in its loans to borrowing members who have paid premiums thereon may charge each member on the settlement with so much of the premiums as was earned at the time the association ceased doing business.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed July 20, 1916.

WILLIAM H. RICHARDSON, for appellant.

BURTON, KANNALLY & MEGAN, for appellee.

MR. JUSTICE MCDONALD delivered the opinion of the court.

Appellant filed a petition in the court below, seeking the repayment by the receiver of appellee of $166, alleged to have been overpaid to said receiver, on a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

loan made by appellee to appellant, the said $166 being the earned portion of a twenty-five per cent. premium with which appellant had been charged on the original loan. On a hearing, the court found the issues for the appellee and dismissed appellant's petition for want of equity.

The only question raised on this appeal is the right of an insolvent building and loan association, in calling in its loans to borrowing members who have paid premiums thereon, to charge each member, on the settlement, with so much of the premium as was earned at the time the association ceased doing business. While this precise question has never been passed upon by the Supreme Court of this State, it was directly involved and adjudicated in the following cases, viz.: *Choisser v. Young,* 69 Ill. App. 252; *Sullivan v. Spaniol,* 78 Ill. App. 125; *Dooling v. Davis,* 84 Ill. App. 393; *Dooling v. Coats,* 86 Ill. App. 411; *Barry v. Downs,* 87 Ill. App. 486; *Dooling v. Smith,* 89 Ill. App. 26; *Hedley v. Geissler,* 90 Ill. App. 565, where it was uniformly held that a borrowing stockholder of a building and loan association was chargeable with the earned premium, from the date of the loan to the date of insolvency. This holding was also adhered to in *Towle v. American Building, Loan & Investment Society,* 61 Fed. 446, wherein the court, in summing up its reasons therefor, stated (p. 448):

"The most difficult question relates to the premium. * * * It is urged that he (the borrowing stockholder) ought to be credited with the premium, because he has neither received it in money, nor its consideration in the length of time for which the loan was to run, or in the manner of its repayment as originally contemplated. The objection would be insuperable if the borrower at the time of the loan stood in the attitude of a stranger to the association, and the act of borrowing constituted such contract as usually arises upon a loan. In such a case the lender could not insist upon the premium while withholding a portion of the considera-

tion and benefit upon which it was passed. But the relation between the borrower and his associate stockholders, and the legal relationship arising from the transaction, are not of that character. * * * The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as is possible. I can think of no fairer rule than to regard the nominal life of the association as eight years, and to look upon each year short of that period as an aliquot portion thereof. This would give the borrower credit for such premium as the number of years, or fractional portions thereof, unlived by the association, bear to the whole period of its normal life of eight years. To that extent, the premium is unearned; for the period already passed, it has been earned."

The foregoing view represents the great weight of authority in this State, as expressed by the cases hereinabove referred to, and is, in our opinion, the correct one. In arriving at this conclusion, we are not unmindful of the views expressed in *Wright v. Curtin*, 137 Ill. App. 276, in which the court cited, with apparent approval, the view stated in the *Young* case, *supra*, wherein it was held that when a building and loan association becomes insolvent, a borrowing stockholder has no more right to withdraw from the assets premiums paid by him and thus decrease the assets in which every stockholder has an interest, than other stockholders have to withdraw the payments made by them, of instalments, interest or premiums; but the court in the *Wright* case, *supra*, concluded by expressing a preference for the view adopted in *Strohen v.*

Franklin Saving Fund & Loan Ass'n, 115 Pa. St. 273, which is not in harmony with that enunciated in the *Young* case, *supra*. Upon an examination of the opinion in the *Wright* case, *supra*, it will be found that the issue raised by the pleadings in the court below, and by the assignments of error on appeal, was on the question of usury, and not the propriety of charging the borrowing stockholder with the earned premium, hence the observations of the court with reference to the application of the premium are mere *dictum*.

The decree of the Circuit Court of Cook county will be affirmed.

Affirmed.

The People of the State of Illinois, Defendant in Error, v. Milton M. Green,. Plaintiff in Error.

Gen. No. 22,092. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Information by the People of the State of Illinois against Milton M. Green, defendant, charging him with adultery and fornication. Defendant was found guilty of the offense of living in an open state of adultery and fornication with one Mary Williams, and was sentenced to pay a fine of two hundred dollars and costs. To reverse this judgment, this writ of error is prosecuted.

FRANK H. NOVAK and CHARLES HUGHES, for plaintiff in error.

MACLAY HOYNE, for defendant in error; ERNST BUEHLER, of counsel.

MR. JUSTICE McDONALD delivered the opinion of the court.

Abstract of the Decision.

1. ADULTERY, § 4*—*when information not repugnant.* An information for adultery and fornication is not open to the objection of repugnancy by reason of charging that the offense was committed by defendant with one "Mary Doe whose name to this affiant is unknown."

2. CRIMINAL LAW—*when objection to form of verification too late on appeal.* The objection to the verification of an information that the words "sworn to" are used instead of the words "affirmed to," relates to a matter of form only and comes too late when first raised on appeal.

3. ADULTERY, § 4*—*when status of companion in adultery need not be shown.* In a prosecution on an information charging defendant and another with living together in an open state of adultery and fornication, where there is competent evidence to show that defendant was at the time of the alleged offense a married man and that his wife was then living and had not been divorced from him, it is not necessary for the prosecution to prove the status of the woman with whom the offense is charged to have been committed.

4. CRIMINAL LAW, § 227*—*when reopening of case to admit evidence not ground for reversal.* Where on a prosecution for adultery and fornication defendant's wife is called as a witness for the prosecution and over defendant's objection is permitted to testify to the fact that he is her husband, it is not an abuse of the trial court's discretion to reopen the case on motion of the prosecution after the case has been closed to permit the introduction of testimony of the brother of defendant's wife that he was present when the marriage took place.

5. CRIMINAL LAW, § 538*—*when admission of evidence not ground for reversal.* Even though the evidence of defendant's wife was incompetent in a prosecution against him, yet where the case was tried without a jury and there is sufficient competent evidence in the record to prove the matter testified to by her, error in admitting her testimony is not ground for reversal.

6. ADULTERY, § 5*—*when evidence sufficient to support judgment.* Evidence in a prosecution for adultery and fornication, examined and *held* to establish guilt of defendant beyond a reasonable doubt.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Valida Densby, Appellee, v. Henry F. Umbricht, Appellant.

Gen. No. 21,317. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. E. M. VANDEVENTER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed July 20, 1916.

Statement of the Case.

Action in tort brought on behalf of Valida Densby, plaintiff, by her next friend, against John Umbricht, Clara Ritter (sued by her maiden name, Clara Umbricht), Henry F. Umbricht and Chicago Bank & Office Fixture Company, a corporation, defendants, to recover damages for injuries sustained by being struck by an automobile, alleged to be owned, managed and operated by said defendants. The action was subsequently dismissed as to the Chicago Bank & Office Fixture Company and John Umbricht (the latter having died), and proceeded to trial as to Henry F. Umbricht and Clara Ritter. Henry F. Umbricht, in addition to the plea of the general issue, filed a special plea denying ownership and operation of the automobile in question. There was a trial by jury resulting in a verdict for plaintiff in the sum of $3,250 against both defendants. A remittitur of $500 having been entered, defendants' motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict for $2,750 against each defendant. From such judgment, Henry F. Umbricht appeals.

Before entry of final judgment, it was suggested of record that plaintiff, since the commencement of suit, had arrived at legal age, and all pleadings were accordingly amended by striking therefrom the words "Marshall O. Densby, her father and next friend," wherever the said words appear therein.

Plaintiff's evidence tended to show that on July 18, 1912, the defendants Clara Ritter and Henry F. Umbricht, together with Emil Umbricht, his brother, were riding in an automobile on Jackson Boulevard (in the City of Chicago), in an easterly direction; that when the automobile reached the west line of Wood street, it "swerved or zigzagged" in a northeasterly direction, passing over the curbstone and the parkway between the curbstone and sidewalk at the northeast corner of the intersection of said streets, and upon the sidewalk there, where plaintiff was walking, striking her with such force as to render her unconscious and to sustain injuries serious and permanent. The automobile continued in its onward course, crashing into the porch of an adjacent brick house, and stopping after the forward portion of said automobile had partially descended the basement steps thereof. There was a conflict of evidence as to the speed at which the car was driven at the time and place in question.

It was admitted that the front seat of the car was occupied by Clara Ritter and her two uncles, Henry F. Umbricht and Emil Umbricht. The evidence of plaintiff tended to show that these three persons were the only occupants thereof; that the defendant Clara Ritter was seated on the lap of one of the two men in question, and that she and the man on whose lap she was seated were jointly operating the car. None of plaintiff's witnesses, however, identified defendant Henry F. Umbricht as the man who was thus jointly engaged. Defendants' witnesses Bahnsen and Rohner, employees of Henry F. Umbricht, testified that they occupied the rear seat of said automobile; that it was operated solely by Clara Ritter; that Henry F. Umbricht was seated on the lap of his brother, Emil Umbricht, and that at no time during the trip in question did the parties on the front seat of the car change their respective positions. It was admitted by Henry F. Umbricht that he first operated an automobile six

to eight years prior to the trial, which was had January 4, 1915; that so far as he knew, his brother Emil never owned nor operated an automobile, and that the latter was a nonresident of Chicago.

GLENNON, CARY, WALKER & HOWE, for appellant; HOWARD T. BALLARD and SIDNEY C. MURRAY, of counsel.

GALLAGHER & MESSNER, for appellee.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

AUTOMOBILE AND GARAGES, § 3*—*when evidence insufficient to support verdict.* In an action to recover for personal injuries alleged to have been caused by an automobile alleged to have been owned, managed and operated by defendant, evidence of defendant's operation or participation in the operation or ownership of the automobile, *held* insufficient to support a verdict against him.

W. E. Fisher, Appellee, v. W. H. Dunn, Appellant.

Gen. No. 21,337. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Action by W. E. Fisher, trading as W. E. Fisher & Company, plaintiff, against W. H. Dunn, defendant, to recover for goods sold and delivered. There was a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

trial by jury, and at the close of all the evidence the court directed the jury to find the issues for plaintiff, and to assess his damages in the sum of $93.49, which was accordingly done, and judgment entered upon the verdict. From such judgment, defendant appeals.

It appeared that defendant purchased groceries and meats from F. F. Brown & Company, and subsequently from plaintiff, who succeeded F. F. Brown & Company. The evidence showed that defendant, at various times, made payment to plaintiff upon stated accounts. Checks evidencing such payments, drawn by defendant and made payable to plaintiff, were in evidence. The last stated account between the parties was for $93.49, rendered August 6, 1914. It was contended by defendant that he did not know he was dealing with plaintiff, but supposed he was dealing with F. F. Brown & Company. The only testimony in the case was that of plaintiff and defendant. The evidence showed that defendant made payments to plaintiff on accounts stated as follows: May 4, 1914, $50; June 6, 1914, $40; July 6, 1914, $55.

CHARLES S. MCNETT, for appellant; LOUIS W. MCINTYRE, of counsel.

WILLIS MELVILLE, for appellee.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. ACCOUNT STATED, § 25*—*when evidence sufficient to support verdict.* In an action on an account stated, evidence examined and *held* sufficient to support a verdict for plaintiff.

2. APPEAL AND ERROR, § 1520*—*when failure to give peremptory instruction in writing not ground for reversal.* While it is the better practice when a peremptory instruction is given to find for one of the parties, to give a written instruction, a failure to do so does not constitute reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ross Attley Lumber Company, Appellee, v. Columbia Hardwood Lumber Company, Appellant.

Gen. No. 21,362. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. BENJAMIN W. POPE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed July 20, 1916.

Statement of the Case.

Action by Ross Attley Lumber Company, a corporation, plaintiff, against Columbia Hardwood Lumber Company, a corporation, defendant, to recover the contract price of two cars of lumber. With its declaration, plaintiff filed its affidavit of claim, showing $1,419.93 due. The defendant filed with its plea of the general issue thereto, an affidavit of merits alleging that said lumber was not up to grade, nor according to contract; that defendant had not accepted same and that plaintiff was indebted to defendant for freight and demurrage charges paid by defendant on said lumber in the sum of $238.92. There was a trial by jury resulting in a verdict in favor of plaintiff in the sum of $1,399.52. From such verdict the plaintiff consented to a remittitur of $38.95, and, thereupon, motion for a new trial was overruled and judgment entered against defendant in the sum of $1,360.57. From such judgment, defendant appeals.

It appeared that defendant, in Chicago, ordered from plaintiff two carloads of quarter oak lumber, "flooded stock, but very well washed and cleaned." Said lumber was shortly thereafter shipped by plaintiff from Heth, Arkansas, to defendant's order, Chicago. There was a conflict of evidence as to the condition of the lumber in question upon its arrival in Chicago. It was sold subject to the rules of inspection

of the National Hardwood Association. These rules did not appear in evidence. Upon its inspection by defendant, the latter refused to accept the lumber, and, subsequently, declined to permit a mutual inspection thereof, on the ground that a portion of said lumber was covered with mud, that it was not possible, therefore, to determine how badly it had been damaged by water, asked plaintiff to pay the freight and demurrage charges thereon and take it away. Defendant's secretary, A. H. Schoen, testified that he telephoned plaintiff, before defendant removed the lumber from the cars, that it was not up to grade and not what defendant ordered; that plaintiff's representative upon the following day requested defendant to unload the lumber from the cars so as to save demurrage, which defendant did. No part of the lumber in question had been used by defendant and remained in its possession, subject to plaintiff's order. There was evidence introduced by defendant tending to show that the value of said lumber, when received, was $330 to $340 less than the contract price.

HARRY A. BIOSSAT, for appellant.

HAMLIN & TOPLIFF and NORMAN K. ANDERSON, for appellee; HOMER H. COOPER, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 450*—*when order and acceptance constitute contract.* An order of goods followed by an acceptance of such order constitutes the contract between the parties.

2. SALES, § 243*—*when warranty implied.* Where goods of a certain kind are ordered and such order is accepted, there is an implied warranty on the part of the seller that the buyer will get the goods ordered.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ross Attley L. Co. v. Columbia H. L. Co., 200 Ill. App. 65.

3. SALES, § 329*—*when evidence insufficient to show acceptance.* In an action to recover the contract price of certain goods, evidence examined and *held* insufficient to show an acceptance of the goods by the buyer.

4. SALES, § 279*—*when conduct of buyer insufficient to show waiver of implied warranty of quality.* In an action to recover the contract price of goods sold, evidence that the buyer after inspecting the goods and rejecting them refused the request of the seller to have an inspection of the goods made by a third person, but continued to retain possession at the latter's request, is not sufficient to show such acceptance as would waive an implied warranty as to quality of the goods.

5. SALES, § 330*—*when instruction erroneous.* In an action to recover the contract price of goods, a requested instruction of the seller that if the jury believed from the evidence that the buyer accepted the goods it would be liable under its contract, should be refused where it excludes the element of implied warranty arising from the contract.

6. SALES, § 330*—*when instruction erroneous.* In an action to recover the contract price of goods, an instruction which proceeds upon the theory that if the goods were not according to the contract but the buyer accepted them, the implied warranty as to quality was thereby waived, is erroneous.

7. SALES, § 330*—*when instruction erroneous.* In an action to recover the contract price of goods, an instruction which erroneously states what will constitute a constructive acceptance and invades the province of the jury by assuming such acceptance should be refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Lewis E. Rice, Plaintiff in Error.

Gen. No. 22,135. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH Z. UHLIR, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Affirmed. Opinion filed July 20, 1916.

Statement of the Case.

Information by the People of the State of Illinois against Lewis Rice, defendant, charging him with being, on September 22, 1915, an inmate of a house of ill fame. Trial by jury having been waived, the cause was submitted to the court, resulting in adjudging defendant guilty and sentencing him to pay a fine of two hundred dollars and the costs of suit, taxed at six dollars. To reverse this judgment, defendant prosecutes this writ of error.

It appeared that defendant, on above date and for six years prior thereto, was employed as clerk in the Queen Hotel, being the premises referred to and described in said information. It was contended by defendant, if he was guilty of any offense under the evidence, that he was guilty of being a keeper and not an inmate of a house of ill fame or assignation, etc.

MAURICE J. SLATER, for plaintiff in error.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

DISORDERLY HOUSE, § 6*—*when evidence sufficient to show defendant an inmate of house of assignation.* On a prosecution by information, charging defendant with being an inmate of a house of ill

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

fame, evidence examined and *held* sufficient to support a judgment that defendant was an "inmate" within the meaning of the Criminal Code, ch. 38, sec. 57a-1 [Cal. Ill. St. Supp. 1916 ¶ 3591 (1)].

The People of the State of Illinois, Defendant in Error, v. Hans Ness, Plaintiff in Error.

Gen. No. 22,257. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. PATRICK B. FLANAGAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1916. Reversed and remanded. Opinion filed July 20, 1916.

Statement of the Case.

Information by the People of the State of Illinois against Hans Ness, defendant, charging him with obtaining from Eugene Sullivan, the informant, with intent to cheat and defraud, by means of false pretenses, the sum of one hundred and ninety dollars. Trial by jury having been waived, the court found the defendant guilty in manner and form as charged in said information, and sentenced him to the House of Correction of the City of Chicago for three months, and further to pay to the clerk of the Municipal Court of Chicago, a fine of two hundred dollars and costs of suit. To reverse this judgment, defendant prosecutes this writ of error.

It appeared that defendant entered into a contract with the said Sullivan whereby he agreed to do certain carpenter work on Sullivan's dwelling house for a certain stipulated sum. Defendant, at Sullivan's request, performed other work on said house in addition to that specified in their contract, for which work defendant, as a result of compromise, accepted one hundred and ninety dollars in full settlement of all claims

against Sullivan. On the day following, defendant executed and delivered to Sullivan a statutory waiver of lien as to said premises. Sullivan and his wife testified that said one hundred and ninety dollars was paid by Sullivan to defendant upon representation by the latter that all bills for labor and material furnished had been paid. Defendant testified that at the time of said settlement, he stated to Sullivan that there were unpaid bills in the sum of four hundred dollars for material used by defendant on said property. Defendant further testified that subsequent thereto, he offered to pay the Hines Lumber Company for lumber used by defendant on said property in monthly instalments, which offer said company declined to accept. There was no evidence of any lien filed on informant's premises by any subcontractor, nor that informant received any notice or claim for such lien, although the information was filed more than four months following the completion of said work by defendant.

PETER J. JOHNSON, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

FALSE PRETENSES, § 37*—*when evidence insufficient to show intent to defraud by false pretenses.* In a criminal proceeding by information, charging defendant with obtaining money from the informant with the intent to cheat and defraud, evidence examined and *held* insufficient to support a judgment against defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Old Colony Life Insurance Company, Appellant, v. Helen L. Graves, Appellee.

Gen. No. 5,921. (Not to be reported in full.)

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed September 13, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Old Colony Life Insurance Company, complainant, against Helen L. Graves, defendant, to vacate and set aside a judgment recovered by defendant against the Cosmopolitan Life Insurance Association for the sum of $1,605.25 and costs of suit, and to restrain the defendant from prosecuting a suit commenced by her against the complainant to enforce payment of the judgment recovered against said Cosmopolitan Life Insurance Association, and a cross-bill seeking affirmative relief. From a judgment for defendant, complainant appeals.

The Old Colony Life Insurance Company was a domestic corporation, doing business as an old-line reserve insurance company; and the Cosmopolitan

Life Insurance Association, on and prior to September 9, 1909, was a corporation existing under the laws of this State, and doing insurance business on the assessment plan. The Cosmopolitan Association had prior to July 1, 1901, been known by the name of the Knights of the Globe Mutual Benefit Association. On September 9, 1909, the complainant entered into an agreement with the Cosmopolitan Life Insurance Association by which the Old Colony Company promised, in consideration of receiving all the assets of the Cosmopolitan Association, to assume all the liabilities of the Cosmopolitan Association then existing, and which might exist, on and after the date of the agreement.

The defendant recovered the judgment mentioned against the Cosmopolitan Life Insurance Association, for the amount claimed to be due her upon the certificate of membership issued to defendant's husband, Frank E. Graves, by the Knights of the Globe Mutual Benefit Association, the predecessor of said Cosmopolitan Association.

BOTSFORD & MCCARTHY, for appellant.

DE GOY B. ELLIS, for appellee; IRVING M. WESTERN and JEFF MCCARN, of counsel.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 768*—*when member of mutual benefit association not bound by by-laws increasing assessments.* Where a certificate of insurance issued by a mutual benefit association provides that the application, together with the certificate and by-laws of the association, shall constitute the contract of insurance, and such certificate provides that the insured shall be liable for assessments according to the table in the by-laws, the rate of assessment for which he is liable is the rate existing at the time he became a member, and it cannot be increased under new by-laws made by a successor to the society.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Old Colony Life Ins. Co. v. Graves, 200 Ill. App. 71.

2. INSURANCE, § 783*—*when forfeiture for nonpayment of assessments not declared.* Forfeiture of a certificate of mutual benefit insurance for nonpayment of assessments will not be declared where the member alleged to be in default is not notified in the precise manner specified by the by-laws of the order.

3. INSURANCE, § 245*—*how forfeitures of insurance policies regarded in law.* Forfeitures of insurance policies are not favored in law.

4. INSURANCE, § 782*—*when right of forfeiture for nonpayment of assessments does not exist.* An insurance policy issued by a mutual benefit association may not be forfeited for nonpayment of assessments when the insured sent a sum which was sufficient to cover the assessments due if the rate had not been illegally increased in violation of his contract.

5. INSURANCE, § 799*—*when beneficiary not estopped to deny forfeiture of policy for nonpayment of assessments.* A beneficiary is not estopped to deny the forfeiture of a policy by the nonpayment of assessments because the insured signed a false reinstatement health certificate, when the insured was not in default, and the insurer had no right to exact such a certificate.

6. INSURANCE, § 904*—*when evidence sufficient to show intention of insured not to make warranties as to his health.* Where an insured, making application for reinstatement after alleged default by nonpayment of assessments, writes across the printed words containing the warranties the words "miscarriage of notice of assessment," he must be deemed to have not intended to make any statement concerning the warranties but, on the contrary, to have expected his reinstatement to be based upon the supposed miscarriage of a notice of assessment to him.

7. INSURANCE, § 852*—*when evidence sufficient to show procurement of release by fraudulent statements of agent.* In an action on an insurance policy, evidence *held* sufficient to establish that a release which was obtained from the beneficiary, the wife of insured, was obtained as a result of fraudulent representations.

8. INSURANCE, § 852*—*when release of insurance company from liability invalid.* A release from liability which is procured by an agent of the insurer from the beneficiary, the wife of the insured, while the latter is in a serious mental and physical condition following the death of the husband, as the result of fraudulent representations as to the making of false statements by the insured in an application for reinstatement, and as to the right of recovery, is invalid.

9. INSURANCE, § 862*—*who is agent of insurance company for purposes of service of process.* A representative of an insurance company who has authority to take applications for membership in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

an insurance corporation, to collect dues and to remit them to the company, to prepare proofs of death and take charge of them for the company, and upon receiving drafts in return to pay death claims to the beneficiaries and obtain releases, must be deemed an agent upon whom process may be served.

10. EVIDENCE, § 39*—*when presumed that process sent through mails received.* It must be presumed that an insurance company received a copy of summons served on its agent which was mailed by him in the due course of the mails.

11. PROCESS, § 78*—*what constitutes laches in failing to question legality of service of summons.* The failure of an insurance company during a period of six months while a suit at law was pending to question the legality of the service of summons on one alleged not to be an agent constitutes laches, which is a bar to equitable relief in action to vacate judgment.

12. JUDGMENT, § 286*—*when equity will not set aside judgment at law for want of proper service of process.* A court of equity will not lend its aid to set aside a judgment at law for want of proper service of process unless it appears that there is a meritorious defense to the judgment or to the claim upon which the judgment is founded.

13. EQUITY, § 189*—*when cross-bill seeking affirmative relief proper in action by insurance company to set aside judgment on insurance policy.* In an action in equity by an insurance company to vacate and set aside a judgment at law recovered by the beneficiary in an action at law on an insurance certificate against the company, to whose business complainant was successor, and to restrain the enforcement of such judgment, *held* that it was proper for defendant to file a cross-bill asking for affirmative relief and seeking a decree to compel complainant to pay the amount alleged to be due on the insurance certificate.

14. EQUITY, § 23*—*when jurisdiction may be exercised to adjudicate all rights of parties.* Where a court of equity has jurisdiction of the parties and the subject-matter of the litigation, it has authority, for the purpose of administering equitable relief, to adjudicate all the rights of the parties which are involved in the litigation.

15. EQUITY, § 23*—*when decree requiring insurance company to pay assumed indebtedness proper.* Where an insurance company has assumed all the obligations of its predecessor, a decree is proper upon a cross-bill seeking affirmative relief filed in an action by the company to set aside a judgment secured against such predecessor, requiring the complainant to pay such judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Winifred Dunlavy, Administratrix, Appellee, v. Chicago, Burlington & Quincy Railroad Company, Appellant.

Gen. No. 6,081.

1. MASTER AND SERVANT, § 98*—*when remedy under Federal Employers' Liability Act exclusive.* Where an action for personal injuries by a servant is within the meaning and scope of the Federal Employers' Liability Act, the master's liability is exclusively governed by the Federal statute and no action can be maintained under the State law.

2. COMMERCE, § 4*—*when evidence sufficient to sustain finding that flagman struck by interstate car.* In an action by a crossing flagman stationed at the intersection of two railroads, for personal injuries sustained while trying to stop a horse and vehicle from crossing the tracks, the gates for which were out of use, evidence *held* sufficient to sustain a finding that plaintiff was struck by one of defendant's loaded cars coming from another State which were being pushed on a side track to be unloaded.

3. COMMERCE, § 4*—*when crossing flagman employed in interstate commerce at time of injury.* A crossing flagman who, in the absence of proper gates to prevent the crossing of teams, attempts to prevent a team from crossing and is struck by a car coming from another State, which is being "shunted" on a side track for the purpose of unloading by the consignee, is engaged in interstate commerce within the Federal Employers' Liability Act.

4. COMMERCE, § 4*—*when servant engaged in interstate commerce.* It is not necessary that a coemployee whose negligence causes the injury to an employee of a railroad be also actually employed in interstate commerce to bring the injured employee within the Federal Employers' Liability Act, where the latter is employed in interstate commerce.

5. MASTER AND SERVANT, § 98*—*when evidence sufficient to sustain finding that defendant is a railroad and common carrier.* In an action against an alleged railroad for damages for injuries to a crossing flagman in its employ, evidence *held* sufficient to sustain a finding that defendant was in fact a railroad and a common carrier.

6. EVIDENCE, § 5*—*when judicial notice taken of statute granting railroad charter and amendments.* Judicial notice will be taken of a statute granting the charter of a railroad constituting part of the public laws and of amendatory acts changing its name.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

7. MASTER AND SERVANT, § 566*—*when recovery may not be had under State law in action for personal injuries.* A recovery cannot be had by a servant for injuries under a State law on pleadings counting only on that law, when the evidence discloses that the case is controlled by the Federal Employers' Liability Act.

8. MASTER AND SERVANT, § 834*—*when defendant not estopped to raise question of variance between pleading and proof.* The defendant in an action by a servant of an interstate railroad to recover damages for personal injuries under the State law is not estopped on appeal to raise the question of variance between the pleading and the proof, showing the right of action under the Federal law, where he was refused a peremptory instruction, and a requested instruction that the Federal law controlled was refused, and such point was also made on a motion for new trial.

9. MASTER AND SERVANT, § 98*—*how provision of Federal statute relative to nonassumption of risk construed.* The Federal statutes only were intended by the phrase "any statute enacted for the safety of employees," in the Federal Employers' Liability Act, section 4 providing that the "employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any Statute enacted for the safety of employees contributed to the injury or death of such employee."

10. MASTER AND SERVANT, § 98*—*what decision controlling in questions involving Federal Employers' Liability Act.* The decisions of the United States Supreme Court are the final authority on questions involving the Federal Employers' Liability Act, and must be taken as a guide in determining what force and effect State statutes and ordinances have in determining liability arising thereunder.

11. MASTER AND SERVANT, § 835*—*when judgment in case erroneously framed under State law reversed.* Where, as is developed by the evidence, an action by a servant for personal injuries is erroneously framed under the State law instead of under the Federal Employers' Liability Act, a judgment for plaintiff must be reversed.

On Rehearing.

APPEAL AND ERROR, § 1236*—*when party trying case on one theory estopped to claim that case tried on wrong theory.* A party plaintiff, who tries a case upon the theory that he is the servant of the defendant and procures a judgment in the court below based upon such theory, and in his argument and statement of the case at the original hearing on appeal proceeds on such assumption, will not be heard to complain on rehearing after reversal of the judgment that the case was tried on a wrong theory and that he was not in fact a servant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915. Rehearing granted and additional opinion filed April 14, 1916.

WALKER, INGRAM & SWEENEY, for appellant; CHESTER M. DAWES and J. A. CONNELL, of counsel.

W. R. MOORE, CYRUS E. DIETZ and THOMAS P. SINNETT, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

James Dunlavy was on July 19, 1912, employed by the Chicago, Burlington & Quincy Railroad Company, the appellant, and the Chicago Rock Island & Pacific Railway Company, as flagman at the crossing of the roads of those companies of a public street in the City of Moline, Rock Island county, Illinois, and while so employed was struck by a freight car that was being "shunted" or pushed by appellant's servants on its track crossing that street, and received injuries from which he died. His widow, Winifred Dunlavy, the appellee, as administratrix of his estate, brought this action in the Circuit Court of Rock Island county to recover for his death. She filed a declaration, which as amended contained counts on common-law negligence and liability under the laws of this State, and counts charging liability under the Federal Employers' Liability Act. Appellant pleaded the general issue and a jury was impaneled to try the cause. At the close of all the evidence appellant asked for a directed verdict in its favor, whereupon appellee dismissed all counts of the declaration drawn under the Federal act. Appellant renewed its motion for a directed verdict, which was denied, and there was a verdict and judgment thereon against appellant for $3,150, from which judgment this appeal is prose-

cuted, and a reversal is asked, mainly on the ground that the cause is comprehended within the meaning and scope of the Federal Employers' Liability Act. If it is, then appellant's liability is exclusively governed by the Federal statute, and no action can be maintained under our State law. This is held and the authorities so thoroughly reviewed in the late case of *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356, that we refer to the opinion of the court in that case without repeating what is there said. That part of the Federal act especially applicable to questions here arising is quoted on page 366 of that opinion. The question is, as said in *New York Cent. & H. River R. Co. v. Carr*, 238 U. S. 260, 9 N. C. C. A. 1 (35 Sup. Ct. Rep. 780): "Whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof. * * * The scope of the statute is so broad that it covers a vast field about which there can be no discussion. But * * * the courts are constantly called upon to decide close questions where it is difficult to define the line which divides the State from the interstate business. * * * But the matter is not to be decided by considering the physical position of the employee at the time of the injury. If he is hurt in the course of his employment while going to a car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal act, although the accident occurred prior to the actual coupling of the engine to the interstate cars." In that case an employee was injured while attempting to set a brake on an interstate car which had been cut out of the train and backed into a siding, but because it was necessary to set such brake in order that the engine to which the car was attached might, when uncoupled, return to the train and proceed on its interstate jour-

ney, he was held to be employed in interstate commerce at the time of his injury.

The street where appellee's intestate was injured was crossed by the main track of the Rock Island road and the main track and several switch tracks of appellant's road, the switch tracks used in part, if not entirely, to serve the Moline Plow Company's factory located near by. There was an ordinance of the City of Moline requiring gates to be maintained at this crossing, and there had for some time been two gates about one hundred feet apart, one on the south of the Rock Island tracks, and one on the north of appellant's tracks, maintained and operated to guard the crossing. Deceased had worked as a flagman for a year or more, and these gates being out of use, he had at the time of his injury been working about a month at that crossing. His duty was the usual one of a railway flagman at a street crossing. He was in the employ of both roads and guarding the street crossing, on approach of trains of either road. Appellant was then using two of its tracks at and near this street crossing in delivering two carloads of malleable iron which had been shipped from Milwaukee, Wisconsin to the Moline Plow Company; and to effect the delivery it was necessarily moving two empty cars from the premises of the Moline Plow Company to make place for them. It is claimed by appellant, and we think the evidence sustains its contention, that deceased was struck by one of the loaded cars; but it is claimed by appellee that the evidence, at least, leaves it in doubt, whether it was one of the loaded cars or one of the empty cars that struck him. However that may be, there is no question that he was injured in the operation of delivering two loaded cars that had been shipped from the State of Wisconsin, and whether he was injured while appellant was trying to make a place for that delivery by removing two empty cars that were in the way, or by the two loaded cars that

were being pushed into the place after it was cleared, is not, in our opinion, very material. Deceased was at the time trying to stop a horse and vehicle that was on the street crossing driving across the tracks, and while so doing was struck by the car that was being "shunted" across the street; which means that it was pushed across the street by placing a stake or bar between the head of the engine and the car and in that way setting the car in motion.

It is true that to come within the Federal statute the carrier must be engaged in interstate commerce and the injured servant be then employed by it in such commerce; but the servant could not so be employed if its master was not engaged in interstate commerce, therefore to say that the servant at the time of his injury was employed in interstate commerce means that his master was also so engaged. It has been held that a servant is engaged in interstate commerce while repairing a switch on tracks used indiscriminately for both kinds of commerce, and that it is immaterial whether the train that struck him was engaged in that commerce or not. *Central R. Co. of New Jersey v. Colasurdo*, 113 C. C. A. 379, 192 Fed. 901. A carpenter repairing a bridge over which both kinds of commerce are carried, if injured under such circumstances, cannot take his choice of remedy under the State and Federal law, for he is engaged in interstate commerce, and the national act is exclusive. *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146 [3 N. C. C. A. 779]. All section men and track laborers working on any part of the track or switches used by a common carrier by railroad, indiscriminately both in interstate and intrastate commerce, are employed in interstate commerce within the meaning of the Federal act. *San Pedro, L. A. & S. L. R. Co. v. Davide*, 127 C. C. A. 454, 210 Fed. 870; *Central R. Co. of New Jersey v. Colasurdo, supra; Zikos v. Oregon R. & Nav. Co.*, 179 Fed. 893. A fireman on a locomotive engine repairing

his engine for an interstate trip is, while so engaged, protected by the national act, although the engine had not been coupled to the cars of the train. *North Carolina R. Co. v. Zachary,* 232 U. S. 248 [9 N. C. C. A. 109]. Yard clerks in the employ of common carriers by railroad while inspecting and making a record of the seals on car doors, putting labels on cars to guide switching crews, etc., are employed in interstate commerce if trains upon which they are so working have any cars containing interstate commerce. *St. Louis, S. F. & T. R. Co. v. Seale,* 229 U. S. 156. It is not essential, where the negligence complained of was that of a coemployee, that he must also be employed in interstate commerce. *Pedersen* case, *supra.* We are of opinion that deceased was employed in interstate commerce at the time of his injury if appellant was then so engaged, and that in so holding, under the facts of this case, we are not in conflict with the holdings of the courts in *Patry v. Chicago & W. I. R. Co.,* 265 Ill. 310; and in *Illinois Cent. R. Co. v. Behrens,* 233 U. S. 473 [10 N. C. C. A. 153], under the facts in those cases. It is true that it must appear that the railroad is operated as a common carrier. *Atchison, T. & S. F. Ry. Co. v. Victoria, F. & W. R. Co.,* 234 U. S. 1. Appellee insists that there is no proof in the record that appellant was engaged in interstate commerce or was a common carrier at the time in question, and suggests that it may have been, so far as the record shows, a company engaged in switching cars, and not an interstate railroad or a railroad engaged in interstate business. We will not stop to inquire what might be the character of a corporation engaged only in switching interstate freight to its consignee. It is to be observed that the fact that appellant is an interstate railroad is one of general knowledge, but whether courts may take judicial notice of that fact is not free from doubt. But we think the record discloses sufficient facts to warrant a finding from the evidence that appellant is

a railroad and a common carrier, and avoid the absurdity of letting the case go off on a presumption that it is a corporation engaged only in switching cars in the City of Moline. Appellee offered proof that appellant was a railroad, operated as such, that it had a main track and several side tracks, that the City of Moline had recognized it as a railroad and passed ordinances regulating its operation; and we take judicial notice of the act granting its charter, which was declared a Public Act (Laws of 1849, p. 96), and we think we may take notice of amendatory acts changing its name. We are inclined to give weight to slight proof, if necessary, to establish a fact of such general knowledge, and one that we must know could have been readily established had attention been called to it on the trial. We therefore conclude that appellee's intestate was at the time of his injury employed in interstate commerce and that the liability of appellant is entirely fixed and governed by the Federal act.

It is urged by appellee that there is no issue in the case whether deceased was at the time of his injury engaged in interstate commerce. This contention is based on the theory that a defendant sued under the State law should in its plea or answer set up facts showing it was engaged in interstate commerce at the time in question. The consideration that the defendant would ordinarily know whether it was so engaged and the injured employee might not know, or have means of knowledge of that fact, gives much support to the contention that the defendant should, as a matter of fairness, be required to give notice by its pleadings of such a defense, and some courts have so held; but it is not now an open question. The court in *St. Louis, S. F. & T. R. Co. v. Seale,* 229 U. S. 156, held, and in *Toledo, St. L. & W. R. Co. v. Slavin,* 236 U. S. 454, reaffirmed, that a recovery cannot be had under a State law on pleadings counting only on that law when

the evidence develops that the case is controlled by the Federal statute, on the ground that "the case pleaded was not proved and the case proved was not pleaded." This answers many contentions of appellee that appellant is estopped to raise the question here. The appellant, as we have seen, asked and was refused a peremptory instruction. It also asked and was refused instructions that the Federal act only controlled, and it made the point on its motion for a new trial, which seems to be more than was required under the above cited authorities.

There is much discussion by appellee of two ordinances of the City of Moline which she pleaded and gave in evidence, one in regard to gates at the crossing, and the other as to "shunting" cars, each of which it is claimed appellant violated, and was thereby guilty of negligence that caused the injury. It is stated again and again in varying language, in the authorities before cited, that the Federal act supersedes all State laws on the subject and controls all cases that fall within its provisions. Section 4 of the Act provides that the "employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any Statute enacted for the safety of employees contributed to the injury or death of such employee." The court in *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492 [8 N. C. C. A. 834], held that the phrase "any statute enacted for the safety of employees" meant Federal statutes and said: "It is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to

State control two of the essential factors that determine the responsibility of the employer." This expression of the United States Supreme Court, which is the final authority on questions arising under the Federal act, must be taken as a guide in determining what force and effect State statutes and municipal ordinances have in determining questions of liability arising thereunder.

It is not claimed by appellee that any count of the declaration on which judgment was entered avers sufficient facts to sustain a judgment under the Federal statute, therefore the judgment must be reversed. We will not attempt to notice in detail other errors discussed in the briefs; they are not likely, if they are errors, to occur on another trial. We express no opinion on any issue of fact other than we have before stated. The cause is remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

ON REHEARING.

PER CURIAM. On rehearing we adhere to our conclusions expressed in the foregoing opinion. Appellee asks us now to consider whether the intestate was employed by appellant at the time in question, and points out evidence in the record showing that he was employed by the Chicago, Rock Island and Pacific Railway Company to protect both the Rock Island road and the C., B. & Q. road crossings at that place, and that the Rock Island road paid him and billed against the Q. for their part of the charge for his services, and argues from that fact that deceased was not in the employ of appellant and therefore was not employed by it in interstate commerce.

Appellee's declaration, on which the case was tried, charged that the deceased was an employee of appellant. The court, at appellee's instance, repeatedly

instructed the jury on the theory that deceased was so employed. In appellee's original argument here, in her statement of the case, she six times asserted and mentioned that deceased was employed by appellant. The case was begun and tried in the court below on that theory and presented to this court and decided on appellee's construction of the employment. Her counsel say now that they overlooked and misapprehended the fact as to the employment, and that the trial court and this court have followed them in that error. Under those circumstances we are not inclined to question that deceased was in the employ of appellant at the time in question. If he was not, entirely different questions arise that have not been argued or hardly touched upon. It was the duty of appellee's intestate to guard the crossing against the approach of appellant's cars. If he was not appellant's employee, some questions arise similar to those considered in *Doering v. Peoria & P. U. Ry. Co.*, 196 Ill. App. 129.

Whether the same conclusion should be reached, we express no opinion. The original will be filed with this supplemental as a final opinion in the case.

The People of the State of Illinois ex rel. Nancy S. Tilden, Appellant, v. J. J. Massieon, Mayor, and City Council of Peru, Illinois, Appellees.

Gen. No. 6,085.

1. DEDICATION, § 25*—*how statutes relative to platting of land and recording of plat construed.* Statutory requirements as to the manner of platting land and as to the necessity of recording the plat are not intended to abridge the right of an owner of land to subdivide it and make a plat thereof, but rather to avoid confusion and establish some rule of uniformity.

2. DEDICATION, § 25*—*when approval of proffered plat wrongfully refused by municipality.* Municipalities may make reasonable regulations respecting the platting of land, but they cannot, by failing to make regulations, put themselves in a position to refuse to approve a proffered plat when the statutory provisions have been complied with and the plat appears to conform to ordinary custom and usage.

3. DEDICATION, § 17*—*what does not constitute acceptance of offer of dedication of streets and alleys.* A city by approving a plat as required by statute does not accept the offer of the dedication of the street and alleys thereon, but the proper local authorities may take them in charge and improve them for public use when they deem fit.

4. MANDAMUS, § 37*—*when statutory approval of proffered plat enforced.* The statutory approval of a proffered plat by municipal authorities is a ministerial act, and enforceable by mandamus.

5. DEDICATION, § 26*—*when petition to compel approval of proffered plat shows compliance with statutory requirements in making plat.* On mandamus to compel municipal authorities to approve a proffered plat, *held* that a petition to which a copy of the plat made in the customary way was attached sufficiently showed fulfilment of statutory requirements in making of the plat.

6. DEDICATION, § 29*—*when plat of land may not be recorded.* An owner of land in a city cannot make and record a plat of his land without the approval of the city authorities.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 20, 1915. Rehearing allowed and additional opinion filed May 24, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

HOBERG & HOBERG and MCDOUGALL & CHAPMAN, for appellant.

CHARLES W. HELMIG, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

A petition in the name of the People of the State of Illinois, on relation of Nancy S. Tilden, for a writ of mandamus to compel the mayor and city council of the City of Peru to approve a certain plat of an addition to said city made by the relator was filed in the Circuit Court. The defendant appeared and the mayor and city council each filed a general demurrer to the petition. The demurers were sustained by the court, and the petitioner, abiding by the petition, final judgment was entered thereon, and she brings the case here by appeal.

The petition for the writ, after entitling the cause is as follows: The petitioner, the People of the State of Illinois, on relation of Nancy S. Tilden, of the City of Chicago, in the County of Cook, and State of Illinois, by Hoberg & Hoberg and McDougall & Chapman, its attorneys, complaining shows that long prior to the 9th day of January, A. D. 1914, the City of Peru, Illinois, was organized under, and now is, and for more than five years last past has been organized under the general laws of the State of Illinois for the incorporation of cities and villages; that by article X, section 5, of chapter 24, of the Revised Statutes of the State of Illinois (J. & A. ¶ 1504), it is provided that: "The city council or board of trustees shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board of trustees, or to some officer to be designated by such council or board

of trustees, for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county, or have any validity until it shall have been so approved"; but that said City of Peru and said city council have never passed any ordinance in accordance with the authority conferred upon said city council by said statute.

Your petitioner further shows that she, the said Nancy S. Tilden, is, and for more than one year last past has been, the owner of the following described real estate, in the said City of Peru, to wit: (particularly describing same), "excepting the coal underlying the surface thereof and the right to mine and remove the same without entering upon or occupying the surface thereof; that said real estate has been within the corporate limits of said City of Peru for many years, and during said time the said Nancy S. Tilden has paid taxes thereon for the benefit of the said City of Peru; that the said Nancy S. Tilden caused the said real estate to be platted into lots, blocks, streets and alleys as an addition adjoining the platted part of said City of Peru, to be called Tilden's Addition to the City of Peru; that in every particular the said plat conforms to all of the provisions of the statutes of the State of Illinois in such case made and provided, and does not in any respect conflict with any of the provisions of any of the ordinances of the said City of Peru; that said relator, on, to wit, the 9th day of January, 1914, presented said plat to the city council of the said City of Peru for approval, and then and there demanded of said city council that it approve said plat, a copy of which plat is hereto attached and marked 'Exhibit A,' and made a part of this petition; that said city council on the 12th day of January, 1914, at a regular meeting of said city council then and there held, referred said petition and said plat to the committee on local improvements

of said city; that said committee on local improvements has presented no report to said city council thereon, and, as your petitioner is informed and believes, and so states the fact to be, said committee will not present any report thereon, but will retain the same for the purpose of aiding the said city council in refusing to approve said plat; that the said city council has refused and still does refuse to approve said plat or to pass thereon, and your petitioner states the fact to be that the said city council will continue to refuse to approve said plat, or to pass thereon, unless compelled so to do by the writ of mandamus of this court; to the great injury and damage of the relator.

"Wherefore the petitioner prays that a writ of mandamus, directed to said mayor and city council, may be issued in due form, commanding said city council forthwith to pass a proper ordinance, in due form, approving said plat and that such further order may be made in the premises as justice may require, etc."

The petition is signed and verified, and a copy of the plat is attached thereto. No question is here raised as to the signing and verification, and presenting the copy of the plat as an exhibit.

The statutory provisions eliminating words and clauses not especially applicable to the questions presented are as follows: It is provided in an act entitled "Plats," chapter 109, Revised Statutes (J. & A. ¶ 8517 *et seq.*):

Section 1. That if the owner of lands wishes to subdivide the same into two or more parts for the purpose of making an addition to a city, he shall cause a survey and plat to be made in the manner there prescribed.

Section 2. The plat, so made, shall be recorded in the recorder's office of the county, after being acknowledged and certified, as there provided.

Section 3. The effect of such acknowledgment and recording of the plat is to convey to the city such portions of the plat as are marked or noted thereon as streets or alleys, and such portions shall be held in the corporate name thereof in trust and for the uses and purposes set forth or intended.

Section 5. Makes it a penal offense to sell, offer for sale or to lease for any term exceeding five years, any lot or block in any city or addition thereto without complying with all the provisions of the act.

By Section 13, chapter 115, Revised Statutes (J. & A. ¶ 9110), in the act entitled "Recorders," it is made a penal offense for any recorder to record any plat of land situated in a city until the same shall have been approved by the legislative authority of the city in which such land is situated, or by some city, town or village officer for that purpose to be designated by resolution or ordinance of said legislative authority.

In the act entitled "Cities, Villages and Towns," chapter 24, article X, sec. 5 (J. & A. ¶ 1504) reads as follows: "The city council or board of trustees shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board of trustees, or to some officer to be designated by such council or board of trustees, for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county, or have any validity until it shall have been so approved."

If the petition for the writ shows compliance by the relator with all the statutory provisions in relation to the plat, the question presented here has been decided by the Appellate Court of the Fourth District in *People v. Board Trustees of Village of Mounds*, 122 Ill. App. 449, except in that case the municipal authorities had passed a general ordinance providing for the sub-

mission of such plats to the village board and prescribed the manner of its action thereon, while here no such ordinance has been passed by appellee. A general demurrer to the petition in that case was sustained by the trial court, and judgment entered against the relator which was reversed on the ground that it was not a matter of discretion of municipal authorities to grant or withhold approval of a plat prepared and presented in compliance with statutory provisions. The court said: "Surely it was never intended by the Legislature to clothe a village board or village officer with power to annul chapter 109 in its application to the platting of land within the corporate limits. If that were so intended we should look for a different order in the proceedings prescribed by the statute and expect the first requirement to be the authority, consent or approval of the village board. Within the language of the statute it is the plat and nothing more that is to be submitted for approval. The land belonged to the relator. His right to subdivide and plat it is a substantial right sanctioned and regulated by chapter 109, but it was given to the village board to see that the plat was made in compliance with the statute and in conformity with any reasonable regulations or requirements by ordinance respecting the size of the blocks and lots, the direction and width of the streets and alleys, or other detail of the survey. In our opinion this is the extent to which discretion was given the board."

We are referred to no other Illinois case construing these statutes on the questions here presented, and know of none. The conclusion reached by that court seems to us correct and its reasoning sound. We see nothing in the fact that in one case the municipality had passed a general ordinance on the subject, and in the other it had not, that should control the decision.

It is a matter of common observation and common

knowledge, especially in this country of rapidly growing and expanding cities and villages, that lands situated therein are required by both seller and purchaser to be platted so that they can be bought and sold by description referring to plats, and it is also convenient for governmental purposes of general and special taxation that they be so platted. The right of the owner to subdivide his lands and make a plat thereof that is legally recognized, is a valuable right, and one that is generally recognized and protected by the courts. Statutory requirements as to the manner of platting and the necessity of recording the plat are not intended to abridge this right, but rather to avoid confusion and establish some rule of uniformity in its exercise. When our legislature delegated to municipal corporations the power to further supervise the platting of lands within their boundaries, it cannot be understood to intend that those authorities could, at will, prevent any landholder from making plats and sales thereunder of his land. Very likely, as suggested in *People v. Board Trustees of Village of Mounds, supra*, municipalities may make reasonable regulations respecting the platting, which must be observed, but we do not think they can, by failing to make any regulation in that respect, put themselves in a position to refuse to approve a plat proffered when the statutory provisions have been complied with, and the plat appears, as does this one, to conform to ordinary customs and usages in such matters.

Appellee is of the opinion that the city by approving the plat accepts the streets and alleys marked thereon and is compelled to put them in condition for travel, and urges in that view of the case there is great reason for permitting a municipality discretion in approving a plat. The same ground was taken by counsel in *People v. Board Trustees of Village of Mounds, supra*, and the position was there correctly held untenable.

We do not understand that the approval of the plat by the city operates as an acceptance of the offer to donate the streets and alleys therein named, to the city. We are of the opinion that the rights and privileges of the city are the same regarding the acceptance of the streets and alleys offered by the plat, after the plat is approved as required by the statute, that they would be had the statute not required approval of the plat by the municipality. It is said in Elliot on Roads and Streets (2nd Ed.), sec. 118, that the dedicator "leaves the streets to be opened by the proper local authorities at such a time as the public interest may require, and of this the local authorities are the judges. It is for them to determine when the public interests demand that the ways as laid out on the plat shall be taken in charge and improved for public use." This text of Elliott's is cited and its doctrine approved in *Village of Lee v. Harris*, 206 Ill. 428.

There was a provision in the charter of the City of Detroit requiring the board of public works to approve plats without which approval the plat was invalid. The Supreme Court of Michigan had the question of the duty of the municipal officers under that provision before it in three cases, and reached conclusions in accordance with our construction of our statutes above expressed, and held mandamus would lie to compel approval. (*Campau v. Board of Public Works*, 86 Mich. 372; *Van Husan v. Heames*, 91 Mich 519; *Owen v. Moreland*, 132 Mich. 477.) To the same effect is also, *State v. Chase*, 42 Mo. App. 343, and in that case on the question whether mandamus is the proper remedy, the court said: "The plaintiff having done on his part all the law demands, the approval of the plat by defendants is merely a ministerial duty required of them, the performance of which may be compelled by mandamus." We have no doubt that the act of appellee in approving the plat is ministerial—not

judicial in its nature. In many cases where a ministerial act is required to be performed by public officers, they must determine preliminary facts that involve the exercise of judgment on their part in order to determine whether a stated case exists calling upon them to act, but this does not render the act judicial. *Town of Somonauk v. People,* 178 Ill. 631.

Appellee says that the petition does not sufficiently show that the requirements of the statute were complied with in making the plat. A copy of the plat is made a part of the petition, and appellee argues the case on the theory that it is a part of the petition to be considered by us, therefore it is not necessary that the body of the petition should state facts that are shown by an examination of the plat. That being conceded, there is no objection, as we understand appellee, except that the figures indicating the width of the streets do not show whether feet, rods or inches are meant. The plat is drawn to scale, as shown by its certificate, and there is no difficulty in determining that the figures indicate feet. It is the usual way of preparing plats. We see nothing in that objection.

The provision in the Cities and Villages Act, requiring approval of the plat by the municipal authorities, closes with a provision that the plat shall not be entitled to record or have any validity until it shall have been approved "in such cases," that is, in cases where the city has provided by ordinance for submission of the plat, and appellee calls our attention to that feature of the statute and suggests that the plat might be recorded in this case because the city had not made any provision for submission. There would be room for this contention but for the imperative provision in the Recorders Act that the plat shall not be recorded until it has been approved by the legislative authority of the city. With that provision in view, it seems clear that an owner cannot make and record

a plat of his land without the approval of the city authorities.

We are of the opinion that the trial court erred in sustaining the demurrer. The judgment is therefore reversed and the cause remanded with directions to the Circuit Court to overrule the demurrer.

Reversed and remanded with directions.

ON REHEARING.

PER CURIAM. After this case had been considered and decided in this court the Legislature amended section 62 of the Revenue Act (J. & A. ¶ 9280) on June 29, 1915, so as to forbid a city, town or village officer to approve a new subdivision of any tract of land unless all redeemable sales for unpaid taxes or special assessments have been redeemed and all forfeited taxes or special assessments have been paid, and unless a statement from the county clerk is indorsed upon the proposed plat of the new subdivision that the county clerk finds no reasonable tax sales or unpaid forfeited taxes against any of the real estate included in such plat.

We granted a rehearing to consider what effect this subsequent statute should have upon our decision. It is contended in reply to the petition for rehearing that this statute is invalid, and if not invalid does not apply to this case. We conclude that as the judgment rendered in the court below was erroneous when entered, it should be reversed and the cause remanded to the court below, and that the record now before us does not give us authority to pass upon any question as to the validity or applicability or effect of said new statute, but that counsel should be left to take such steps in the trial court as they may deem proper.

We therefore readopt and refile our former opinion but vacate the directions therein given and simply reverse the judgment and remand the cause.

Reversed and remanded.

Julia Jacobson, Appellant, v. Joseph M. Ramey, Appellee.

Gen. No. 6,076. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed December 27, 1915. Rehearing denied February 1, 1916.

Statement of the Case.

Action by Julia Jacobson, plaintiff, against Joseph M. Ramey, defendant, to recover damages for personal injuries sustained as a result of falling through a defective stairway on premises leased by defendant to plaintiff's husband. From a judgment for defendant, plaintiff appeals.

Plaintiff filed a declaration containing three counts. Defendant did not demur thereto, but filed a plea of not guilty. There was a jury trial and evidence for the plaintiff was heard. Plaintiff offered in evidence a lease of said building from Ramey to her husband, Samuel Jacobson. Defendant objected and the court reserved its ruling. At the close of the plaintiff's evidence the court sustained the objection to said lease. Thereupon plaintiff by leave of court filed an additional count. The accident was on October 31, 1912, and the additional count was filed January 22, 1915. No demurrer was interposed thereto but defendant filed a plea of not guilty and a plea of the statute of limitations. Plaintiff demurred to the plea of the statute of limitations and that demurrer was overruled, and plaintiff abided by her declaration. The plaintiff again offered the lease in evidence and the court sustained an objection thereto, and granted a motion by defendant to exclude all plaintiff's evidence and instructed the jury to return a verdict for defendant,

and this was done. Motions for a new trial and in arrest of judgment were denied, and defendant had judgment in bar, and plaintiff below appealed therefrom. Defendant argued that the original declaration did not state a cause of action, and that if any cause of action for plaintiff had ever been stated, it was in the amended declaration, filed more than two years after the injury, and that the statute of limitations barred the action.

The original declaration sufficiently alleged the location of this building in the City of Streator; that it had a stairway on the outside; that defendant owned the building at the time of the injury; that the stairway was defective, rotten and unsafe; that plaintiff fell through it and was injured; and that defendant had made a contract with the husband of plaintiff to keep it in repair.

The second count of the original declaration alleged that on or about May 23, 1910, defendant entered into an agreement with Samuel Jacobson, the husband of plaintiff, to keep the roof, stairway and outer walls of said building in good repair and condition. That count did not say in express terms that this agreement was in writing, but it said that a certain matter therein was "in words and figures as follows."

The count further averred that thereby defendant undertook to keep said stairway in good repair and condition until June 15, 1915, which was not contained in what was quoted from the agreement.

The additional count set out said instrument in full, and it appeared that the agreement mentioned in the second count was a written lease of said building from defendant to plaintiff's husband to be used only as a store building and a flat for living rooms, and that defendant was to so remodel the building, and that the upper floor should have suitable apartments for flat purposes. The proof was that the upper story was so remodeled, and that at the time of the accident to plain-

tiff, Samuel Jacobson and his family lived in the upper rooms, and that this stairway was their means of access to the street, and that plaintiff lived there with her husband, and that she was passing between the street and their living rooms when this board of the stairway gave way beneath her and caused the injury.

NICHOLAS J. PRITZKER and LLOYD PAINTER, for appellant.

ARTHUR H. SHAY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. LIMITATION OF ACTIONS, § 58*—*when declaration may be amended or additional count filed after running of statute.* A plaintiff may amend his declaration or file an additional count stating his cause of action in a different way after the statute of limitations has run without subjecting his action to the bar of the statute.

2. LIMITATION OF ACTIONS, § 56*—*when new cause of action set up by amended declaration or additional count after running of statute barred.* Where the cause of action set up by an amendment to the declaration or by an additional count is a new one and not a mere restatement of the cause of action set out in the original declaration, such amendment or additional count will not relate back to the commencement of the suit, and if the statute of limitations has run before such new cause of action has been stated, the plea of the statute will be a defense to such new cause of action.

3. NEGLIGENCE, § 119*—*what plaintiff must allege in action for damages for personal injuries negligently caused.* One of the three essential elements of a cause of action for damages for personal injuries negligently caused, which the plaintiff must aver and prove in order to entitle him to recover, is the existence of a duty on the part of defendant to protect the plaintiff from the injury of which he complains.

4. NEGLIGENCE, § 119*—*when averment as to duty of defendant to prevent injury insufficient.* An allegation in an action for damages for injuries alleged to be due to the negligence of another, that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

it is the duty of the defendant to do or not to do certain things, is a legal conclusion and insufficient, as the declaration must state the facts from which the duty may be raised.

5. PLEADING, § 466*—*when defects or omissions cured by verdict.* The general rule is that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict.

6. LIMITATION OF ACTIONS, § 60*—*when amendment or additional count merely a restatement of cause of action.* Where there is no demurrer to a declaration and the question whether the cause of action stated in an amended declaration or additional count filed after the running of the statute of limitations is the same cause of action as is stated in the original declaration arises upon the pleadings before verdict, such amended declaration or additional count will be held to only restate a good cause of action defectively stated in the original declaration, if the necessary allegations may be fairly and reasonably inferred or may reasonably be found to be implied in what is said in the original declaration.

7. LANDLORD AND TENANT, § 258*—*when presumed that lessee had object in having stairway repaired.* Where a landlord is required by the terms of a lease to remodel a building so that the lower floor could be used for store purposes and the upper floor for flat purposes, by the lessee and to build an exterior stairway as means of access to such upper floor and to keep the stairway in good repair, it must be presumed in an action by the wife of lessee for damages for injuries alleged to be due to defects in the stairway that the lessee had an object in requiring the stairway to be kept in repair, and that it was intended by the lease that he should use it in some way connected with his own home or business.

8. HUSBAND AND WIFE, § 73*—*when wife of lessee right to use stairway on leased premises.* A wife has the right to use an exterior stairway of premises leased by the husband, leading from an upper story used by them for flat purposes to the street.

9. LIMITATION OF ACTIONS, § 68*—*when declaration defectively stating good cause of action not barred.* An original declaration by a wife of a lessee against the landlord for damages for personal injuries sustained because of the failure of the landlord to keep an exterior stairway leading from the second floor of the leased building, the upper floor of which was used by lessee for residence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

purposes and the lower part for business purposes, to the street, in repair, which alleged that defendant entered into an agreement with the husband of plaintiff to keep the roof, stairway and outer walks of the leased building in good repair and condition, and further averred that thereby defendant undertook to keep said stairway in good repair and condition, *held* to defectively state a good cause of action as to the duty of the defendant to repair the premises and as to the right of plaintiff to be upon the stairway when injured, so that when amplified by an additional count setting out the terms of the agreement—a lease—the statute of limitations was not a bar.

10. LANDLORD AND TENANT, § 226*—*when landlord liable to wife of lessee for damages for personal injuries due to defective stairway.* Where a landlord has covenanted to keep premises in repair, the lower floor of which is used by the lessee for business purposes and the upper for residence purposes, he is liable to the wife of the lessee for damages for personal injuries sustained while using a defective stairway leading from the upper floor to the street.

James B. Paden, Defendant in Error, v. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.

Gen. No. 6,142. (Not to be reported in full.)

Error to the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 27, 1915. Rehearing denied February 1, 1916.

Statement of the Case.

Action by James B. Paden, plaintiff, against the Chicago, Rock Island & Pacific Railway Company, defendant, to recover damages for personal injuries sustained as a result of the car from which he was unloading coal being struck by another car with such force as to throw plaintiff to the ground. From a judgment for plaintiff, defendant brings error.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Plaintiff was a teamster, and was unloading coal from a car that had been placed on a side track by the defendant, and while so engaged a switching crew of the defendant shoved another car against the one from which the plaintiff was taking coal, with such force as to throw him to the ground and injure him.

The declaration charged that the defendant in the use and operation of its railroad had a team or merchandise track connected with its road in the Village of DePue, in the County of LaSalle, which track was used by the defendant in placing cars thereon containing freight, so that parties entitled thereto might be enabled to unload said freight from said cars, or load freight into the cars; that on January 12, 1914, the plaintiff was engaged in unloading certain freight from one of the cars so used and operated by the defendant while said car was standing upon the said merchandise track.

The only instruction given at the instance of plaintiff was on the measure of damages. The injury claimed was an aggravation of a hernia, from which the plaintiff had been some time suffering, and there was evidence before the jury as to a surgical operation performed on plaintiff after the time in question. The instruction complained of informed the jury that if they found the defendant guilty in assessing damages "they should take into consideration all the facts and circumstances shown by the evidence before them; the nature and extent of the plaintiff's physical injuries, if any, so far as the same are alleged in the declaration and shown by the evidence."

The court, at the instance of the defendant, instructed the jury that the damages must be confined to such as were the natural proximate result of the defendant's neglect; that the burden of proof was on the plaintiff to show his injuries were caused by the defendant's neglect, and if they believed that the injuries

from which plaintiff complained resulted from other causes than the defendant's negligence that the complainant could not recover anything for injuries, and specifically told them if they found from the evidence that the condition of the plaintiff's rupture which necessitated the operation he underwent did not result from the accident of which he complains as a natural and proximate consequence, but was a condition in no way connected therewith, then in determining what his damages were they should leave out of consideration the fact of the operation, the time lost thereby, and the expense paid and suffering connected therewith.

WILLIAM D. FULLERTON and A. B. ENOCH, for plaintiff in error.

THOMAS N. HASKINS and BUTTERS & CLARK, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. PLEADING, § 466*—*when defects or omissions in, cured by verdict.* Where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict.

2. PLEADING, § 466*—*when defective declaration in action for negligent injuries cured by verdict.* In an action by a teamster for damages for personal injuries sustained as the result of the car from which plaintiff was unloading coal on a sidetrack of a railroad company being struck by another car being switched on the track by the company's servants, a declaration which failed to allege

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

that plaintiff was lawfully on such side track, *held* good after verdict.

3. DAMAGES, § 205*—*when instruction that damages can only be based upon injury complained of is necessary.* Where a plaintiff in a personal injury action is suffering disability that may have arisen only in part from the injury complained of, instructions as to the measure of damages that might otherwise be good should be carefully guarded, and the jury clearly informed that damages can be based only upon the injury complained of.

4. DAMAGES, § 202*—*when instruction on measure of damages for personal injuries not misleading.* In an action for damages for personal injuries sustained by a teamster engaged in unloading coal from a car on a railroad side track, as the result of the car being struck by another car so as to cause plaintiff to fall to the ground, an instruction on the measure of damages that if the jury found the defendant guilty in assessing damages "they should take into consideration all the facts and circumstances shown by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, so far as the same are alleged in the declaration and shown by the evidence," *held* not misleading where the court gave other instructions limiting the plaintiff's damages to such as were the proximate result of the defendant's neglect, and were not due to other causes, and specifically told them that if they found from the evidence that the condition of plaintiff's rupture which necessitated the operation he underwent did not result from the accident as the natural and proximate consequence thereof, then, in determining the damages, they should leave out of consideration the fact of the operation, the time lost thereby, and the expense paid and suffering connected therewith.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Joseph H. Paxton et al., Appellees, v. William H. Fabry et al., Appellants.

Gen. No. 6,221. (Not to be reported in full.)

Appeal from the Circuit Court of Lake county; the Hon. CLAIRE C. EDWARDS, Hon. CHARLES H. DONNELLY and Hon. ARTHUR H. FROST, Judges, presiding *en banc*. Heard in this court at the October term, 1915. Reversed. Opinion filed December 27, 1915. Rehearing denied February 1, 1916.

Statement of the Case.

Bill by Joseph H. Paxton and thirteen other lessees of property to restrain Bradford E. Simmons, as landlord, and William H. Fabry and M. F. Ellis, as lessees, from using the premises occupied by defendants Fabry and Ellis as a drug store, cigar store and physician's office. From a decree granting a preliminary injunction, defendants appeal.

Some time prior to August, 1914, defendant Bradford E. Simmons was the owner of a store building and lot on which it was located, in Zion City, Lake county, Illinois, and the other defendants, William H. Fabry and M. F. Ellis were using a part of it, under a lease from Simmons, as a drug store in which they also sold cigars. A resident physician had an office in the building. On May 3, 1915, after this condition had existed for nine months or more, plaintiffs, fourteen lessees of residence properties in the City of Zion, filed a bill for injunction to restrain such use of said building, and applied to the court for an interlocutory decree enjoining such use pending the litigation. The application was heard on the bill and affidavits in support thereof, and affidavits of the defendants who appeared and without answering the bill, resisted the application. A decree was entered restraining the defendants, until the further order of the court, from using any part of

said premises as a cigarette, cigar or tobacco store; or a place for the manufacture or sale of tobacco in any form or manner; or pharmacy, apothecary shop or drug store; or a place for the manufacture or sale of drugs or medicines of any kind; or the office or residence of a practicing physician, surgeon or other person actually engaged in the practice of medicine or surgery.

The theory of the bill was that John Alex. Dowie, in his lifetime, prior to 1899, organized a religious sect opposed to the business and practices sought to be enjoined, and various other forms of business regarded legitimate and proper in civilized communities, and still other practices that are generally condemned as immoral and illegal; that in 1899 the site of Zion City was selected as the location of the society in which such business and practices should be prohibited; that in furtherance of that purpose Dowie obtained title to nearly all the land within the present city limits and executed leases for the term of 1100 years, containing restrictive covenants against said uses; that a building plan was also adopted to that end, and various statements were publicly made and published by Dowie proclaiming such purposes; that afterwards Dowie became insolvent and his property, including a large portion of the land within the limits of Zion City, passed into the hands of a receiver under the control of a Federal court, and the receiver made sales of the property in various ways and under various restrictions that resulted in maintaining such restrictions as to all land sold; that the result of these facts was that the owners of land in the City of Zion holding by or under titles containing such restrictive covenants were bound by the covenants, and also that the owners of land there situated holding under titles in which there were no restrictive covenants were also bound if they purchased with knowledge of the plan upon which the said city was founded.

JONES, ADDINGTON, AMES & SEIBOLD, for appellants; KEENE H. ADDINGTON, ALBERT F. MECKLENBURGER and WALTER HAMILTON, of counsel.

THEODORE FORBY and C. P. BARNES, for appellees; SAMUEL W. PACKARD, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 855*—*what is effect of absence of certificate of evidence.* Where there is no certificate of evidence, the Appellate Court will not consider affidavits on the hearing of a preliminary injunction which are incorporated in the record and certified to by the clerk of the court.

2. APPEAL AND ERROR, § 1271*—*when presumed court warranted in finding allegations in bill for preliminary injunction true.* It will be presumed, in the absence of a certificate of evidence, on appeal from a decree granting an interlocutory injunction, where affidavits read on the hearing are a part of the record on appeal, that the court, on a consideration of the bill and the affidavits filed, was warranted in finding that the allegations of fact found in the bill were true.

3. INJUNCTION, § 164*—*what considered on application for preliminary injunction.* The merits of the case are not passed upon in considering the issuance of a preliminary injunction, but the court should inquire whether less harm will result to the enjoined party if he should finally be victorious than would accrue to the complainant from the absence of the injunction were he a winning party.

4. INJUNCTION, § 154*—*when preliminary injunction granted.* When the questions to be ultimately decided are serious or doubtful, the legal discretion of the judge in granting a preliminary injunction should be influenced largely by the consideration that the injury to the moving party will be certain and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable and may well be indemnified by proper bond if the injunction is granted.

5. INJUNCTION, § 158*—*what is object of preliminary injunction.* The object of a preliminary injunction is to maintain the *status*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

quo to maintain property in its existing condition, to prevent further or impending injury and not to determine the right itself.

6. INJUNCTION, § 154*—*when mandatory injunction not granted on preliminary hearing.* Great caution should be used in issuing a mandatory injunction at a preliminary hearing and the complainant must make out a clear case free from doubt or dispute as a basis for its issuance.

7. INJUNCTION, § 154*—*when preliminary injunction will not be issued.* When the question of law is one of the chief issues to be determined on the final hearing, and complete relief can then be afforded, the complainant is not entitled to a preliminary injunction.

8. INJUNCTION, § 240*—*when mandatory injunction granted on final hearing.* Where, on a final hearing a mandatory injunction is asked, it is the duty of the court to consider the inconvenience and damage that will result to the defendant as well as the benefit to accrue to the complainant, by the granting of the writ, and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefits by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ.

9. INJUNCTION, § 154*—*what does not constitute irreparable injury authorizing issuance of temporary injunction.* The maintenance of an ordinary drug store and physician's office in the City of Zion during the pendency of a suit for an injunction, in violation of restrictive covenants, does not constitute such a threatened mischief and injury as should be held irreparable in passing on a motion for a temporary injunction.

10. INJUNCTION, § 154*—*when temporary injunction is in nature of mandatory injunction and improper.* An order restraining the use of a building for an ordinary drug store and physician's office in a city during the pendency of a suit, in violation of restrictive covenants, is in the nature of a mandatory injunction granting the relief sought by the bill in advance of a hearing on the merits, and should not be granted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Witteman Company, Defendant in Error, v. Frank A. Goeke et al., Plaintiffs in Error.

Gen. No. 6,134.

1. APPEAL AND ERROR, § 623*—*what is effect of one defendant dying pending appeal by other defendants.* Where one of several defendants dies pending the appeal by other defendants and the death of the deceased is suggested, the suit may proceed without further action by appellants as to such deceased defendant or his representatives.

2. APPEAL AND ERROR, § 801*—*when ruling of court striking amended special plea from files not reviewed.* A ruling of the court striking an amended special plea from the files cannot be reviewed in a court of appeal unless the pleading and the showing and the ruling are preserved in a bill of exceptions.

3. APPEAL AND ERROR, § 1275*—*when presumed court properly struck amended special plea from files.* In the absence of a bill of exceptions, it will be presumed that the trial court properly struck from the files an amended special plea.

4. PLEADING, § 379*—*when issue formed.* Where a special count in a declaration against the guarantors on a promissory note was met by a plea of nonassumpsit, to which was filed a proper replication, *held* that the case was at issue.

5. APPEAL AND ERROR, § 1275*—*when presumed that proofs justified finding and judgment.* Where the proofs heard upon a trial are not preserved by a bill of exceptions, it must be conclusively presumed that the proofs justified the finding and the judgment.

6. PLEADING, § 379*—*when oral issue formed by parties voluntarily going to trial.* Where parties voluntarily go to trial without the formation of a written issue, the case is treated as if an oral issue was formed.

7. GUARANTY, § 30*—*when executrix not proper party to action against joint guarantors of note.* Where a suit is brought against several persons on a guaranty, including the executrix of a deceased guarantor, the suit is properly dismissed as to the executrix, as the cause could not proceed against them jointly.

8. APPEAL AND ERROR, § 1452*—*when failure to amend declaration by striking out name of defendant dismissed from case not reversible error.* Where a suit was brought on a guaranty against several persons jointly, including the executrix of a deceased guarantor, the fact that, upon dismissing the case as to the executrix the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

declaration was not amended by striking out her name as a defendant, *held* not reversible error.

9. GUARANTY, § 39*—*when joint judgment lies only against living guarantors.* In an action against several guarantors of a promissory note including the executrix of a deceased guarantor, a joint judgment can be rendered only against the living guarantors.

Error to the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

J. C. MURPHY and E. L. LYON, for plaintiffs in error.

J. M. MANLEY, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is a suit by the Witteman Company, hereinafter called plaintiff, against certain guarantors of a promissory note. After certain pleading a jury was waived and the cause was tried and there was a finding and a judgment against four of the defendants for $2,752.75, and two of the defendants have sued out this writ of error to review said judgment. Another defendant has appeared and adopted the assignments of error by said original plaintiffs in error. The death of the fourth defendant has been suggested here. Plaintiffs in error have not brought in his legal representatives or heirs at law. We assume that under *Fortune v. Gilbert*, 210 Ill. 354 (which was a writ of error in the Supreme Court), the suit may proceed here without further action as to said deceased defendant or his representatives or heirs. There is no bill of exceptions in the record. The attorneys who prosecute the writ of error say they were not in the case in the court below.

The record here is certified to be complete, but it does not disclose such a condition as defendants claim in their brief. Plaintiff filed a special count upon the guaranty sued upon and the common counts. Defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ants filed a plea of the general issue to the special count of the declaration and a special plea to the entire declaration. To this special plea a demurrer was sustained. Defendants did not abide by that special plea but obtained leave to file an amended special plea. Counsel for defendants state that plaintiff filed a demurrer to said amended special plea; that it was sustained; that defendants then obtained leave to file a second amended plea and did file the same; that plaintiff filed a demurrer thereto; that the demurrer was sustained and the second amended special plea was stricken from the files. This is a misstatement of the record. An amended special plea was filed. It was not demurred to, but a motion was made to strike it from the files and that motion was granted. No question arises here upon the original special plea because, by filing by leave of court an amended special plea, defendants abandoned the original special plea. No question arises upon the amended special plea because it was not demurred to, but was stricken from the files, and no bill of exceptions was taken, preserving said amended plea and the showing that was made upon the motion to strike it from the files nor the ruling of the court thereon. In this State a ruling of the court striking a pleading from the files cannot be reviewed in a court of appeal unless the pleading and the showing and the ruling are preserved in a bill of exceptions. In the following cases a pleading had been stricken from the files and the rule just stated was applied: *Snell v. Trustees M. E. Church,* 58 Ill. 290; *Barger v. Hobbs,* 67 Ill. 592; *Reed v. Horne,* 73 Ill. 598; *Harms v. Aufield,* 79 Ill. 257; *Fanning v. Russell,* 81 Ill. 398; *Consolidated Coal Co. of St. Louis v. Peers,* 166 Ill. 361; *Gaynor v. Hibernia Sav. Bank,* 166 Ill. 577; *Nester's Estate v. Carney Bros. Co.,* 98 Ill. App. 630; *Ackerman v. People,* 100 Ill. App. 125. In *Town of Scott v. Artman,* 237 Ill. 394, the same principle was applied to a

special statutory proceeding in which the separate answer of one defendant had been stricken from the files, and that action was assigned for error. In some of these cases stress is laid upon the proposition that an exception to the ruling of the court must be preserved by a bill of exceptions in order to present the matter for decision. That particular matter has been obviated by section 81 of the Practice Act, as amended in 1911 (J. & A. ¶ 8618). But the other cases show that that is not the only purpose for which a bill of exceptions is necessary in order to present such an order for review. A pleading which has been stricken from the files is no longer a part of the common-law record and can only be brought to the attention of the upper courts by a bill of exceptions. Such a motion is not based upon any defect of the pleading which could be reached by demurrer, but upon other grounds, and the parties have a right to offer proofs by affidavit or otherwise, and without a bill of exceptions it cannot be known whether the proofs justified the order. Unless those proofs are preserved by a bill of exceptions, the order must be presumed to be correct. It was said in *Fanning v. Russell, supra*: "It will not be denied that cases may occur where such an order would be proper. There being no bill of exceptions to show the contrary, this court will presume that a proper case for such an order was made before the Circuit Court." In *Consolidated Coal Co. of St. Louis v. Peers, supra,* the court said: "There are some circumstances under which the court may properly strike a plea from the files—and this even when it presents a good defense to the action; and therefore, when the record does not show upon what ground the action of the court was based, it will be presumed, in favor of the ruling of the court, that sufficient cause to justify its action was made to appear." In *Gaynor v. Hibernia Sav. Bank, supra,* it was said of *Fanning v. Russell, supra:* "In the last case it was said

that the pleas stricken from the files presented on their face a good defense to the action, but as a case might occur where an order striking them from the files would be proper, it would be presumed, in the absence of a bill of exceptions, that a proper case for such an order was made." Upon this record it is therefore presumed that the court properly struck from the files the amended special plea, and neither the original nor the amended special plea are therefore before this court for review, and the supposed history of the case, set out quite fully in defendant's brief, has no basis in the record before us.

Counsel for defendant insist that there is in this record no general issue, and no issue joined or to be tried, and that all that was or could have been heard was an assignment of damages upon a default. The record is entirely to the contrary. The first plea is to the effect that the defendants named therein (being all the defendants except the defendant Rathbun, hereinafter named), come "and defend the wrong and injury, when, etc., and say that they did not promise in manner and form as the plaintiff has above thereof complained against them in and by the special count of the declaration; and of this the said defendants put themselves upon the country." To this plea appellee replied as follows: "And the plaintiff as to the plea of the defendants to the common counts of the declaration, and as to the plea of the defendants to the special count of the declaration by them first above pleaded, and whereof they have put themselves upon the country, doth the like." There is no formal plea to the common counts in the record before us. There was an order of court which found that the pleadings had been lost and gave leave to supply them, and it therefore may be that there was such a plea to the common counts which was lost and not supplied, but this is a perfect replication to the plea of nonassumpsit, filed to the special count of

the declaration, and it forms a complete issue. Thereafter an order to the following effect was entered on the day of the trial and judgment: "And now by agreement of parties hereto it is ordered by the court that a jury be and the same is hereby waived herein and the issues in this cause submitted to the court for trial to be heard instanter." Here follows the usual order, showing the trial of the cause and the finding and the judgment of the court. It does not admit of doubt that according to this record the issues so submitted and tried were made up of the special count of the declaration upon said guaranty, the plea of the general issue thereto and said replication to said plea. As the proofs heard upon said trial are not preserved by a bill of exceptions, it must be conclusively presumed that the proofs justified the finding and the judgment. It ought also to be said in this connection that the sole object of said attempted special pleas was to set up that these guarantors were released by a valid extension of time to the maker of the note on the back of which the guaranty in suit was written, and that it is held in *Harrison v. Thackaberry,* 248 Ill. 512, and in many cases there cited, that such an extension releasing the surety may be given in evidence under the general issue. Therefore, upon this record, it is conclusively presumed that the defendants had a fair opportunity to prove that defense.

This record does not show a plea to the common counts. It is argued that it was error to go to trial without an issue having been formed upon them. There might be force in this position if the court had compelled defendants to go to trial without issue being joined thereon, but the record above recited shows that defendants were not forced to trial but voluntarily went to trial by agreement. It is well settled in this State that when parties voluntarily go to trial without the formation of a written issue, the case is treated as

if an oral issue had been joined. *Strohm v. Hayes,* 70 Ill. 41; *Shreffler v. Nadelhoffer,* 133 Ill. 536, 547; *Kaestner v. First Nat. Bank of Chicago,* 170 Ill. 322; *Devine v. Chicago City Ry. Co.,* 237 Ill. 278; *Supreme Court of Honor v. Barker,* 96 Ill. App. 490; *Anderson v. Patty,* 168 Ill. App. 151; *Ryan v. McGirr,* 168 Ill. App. 415. Moreover, if the course pursued should be treated as an abandonment of the common counts by plaintiff, no harm would be done defendants, because upon the record the judgment is conclusively presumed to be correct upon the issues which were joined in writing.

The guaranty was signed by five persons, one of whom (Rathbun) had died before the suit was begun, and his executrix was named as a codefendant with the guarantors still living. Afterwards the suit was dismissed by plaintiff as to said executrix, although this was omitted from the abstract. The judgment was against the four living guarantors. The cause could not proceed against them and the executrix jointly, because a judgment at law must be a unit (*Jansen v. Varnum,* 89 Ill. 100), and the judgment against them would be for the payment of a sum certain with execution against their lands and goods, whereas a judgment against the executrix would be that she pay the amount in due course of administration. She could not have been joined as a defendant, and her dismissal was necessary and proper, and it was proper to take judgment against all the living guarantors. It was also necessary and proper to allege in the special count that Rathbun signed the note and that he had since died, and the further allegation that an executrix had been appointed was mere surplusage. Plaintiff might well have amended the declaration by striking out her name as a defendant when it dismissed her out of the case, but the fact that such an amendment was not made did not harm the other defendants, and in our judgment was not reversible error.

The cost of the additional abstract will be taxed against appellants. The judgment is affirmed.

Affirmed.

Christine L. Palm, Appellant, v. Rockford City Traction Company, Appellee.

Gen. No. 6,144. (Not to be reported in full.)

Appeal from the Circuit Court of Winnebago county; the Hon. ARTHUR H. FROST, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by Christine L. Palm, plaintiff, against Rockford City Traction Company, defendant, to recover damages for personal injuries sustained by falling from the step of defendant's street car. From a judgment for defendant upon a directed verdict, plaintiff appeals.

FISHER & NORTH, for appellant.

R. K. WELSH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence insufficient to establish negligence in operation of street car.* In an action by a street car passenger to recover damages for injuries alleged to have been sustained as the result of the negligence of the conductor in per-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

mitting the exit door of the car, which was of the pay-as-you-enter kind, to remain open while the car was in motion, so as to lead plaintiff into the belief that she could safely alight, where it appeared that plaintiff gave the signal to stop, and that she immediately followed two men, one of whom had opened the exit door, and that she was warned by the conductor not to get off, and that he could not close the door after the men who had passed out because plaintiff was in the way, evidence *held* insufficient to establish negligence in operation of the car.

2. CARRIERS, § 476*—*when evidence sufficient to establish that passenger leaving street car while it was in motion was guilty of contributory negligence.* In an action by a street car passenger to recover damages for personal injuries sustained as the result of stepping from the exit door of a pay-as-you-enter car while it was in motion, where it appeared that plaintiff gave the signal to stop and immediately followed two men, one of whom opened the exit door, and either did not hear or disregarded the warning of the conductor not to get off, and the latter was unable to close the door because plaintiff was in the way, evidence *held* sufficient to establish that plaintiff was guilty of contributory negligence.

James M. Swan, Defendant in Error, v. William K. Loofbourrow, Plaintiff in Error.

Gen. No. 6,147. (Not to be reported in full.)

Error to the Circuit Court of Kendall county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916.

Statement of the Case.

Action by James M. Swan, plaintiff, against William K. Loofbourrow, defendant, to recover upon two notes. After judgment by default for plaintiff and denial of a motion by defendant to set aside the default, defendant brings error.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

BENJAMIN F. HERRINGTON, for plaintiff in error.

C. A. DARNELL, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 145*—*when affidavit in support of motion to set aside default insufficient to show defense.* An affidavit of meritorious defense in support of a motion to set aside a default in an action on two promissory notes which related to "this note," without indicating which note was meant, and alleged that the note was given in compliance with a contract for the exchange of lands, but did not give the terms of the contract nor state with whom it was made, but stated that plaintiff did not comply with his part of the contract and that, because of his failure to do so, plaintiff had not received any consideration "for the above mentioned note," and denied that he was indebted to plaintiff in any amount, but did not disclose what plaintiff was required to do by the contract nor that he in any respect failed to comply therewith, *held* to state a mere conclusion and to be insufficient to show a defense to either note.

2. JUDGMENT, § 145*—*when affidavit in support of motion to set aside default insufficiently discloses right of set-off.* An affidavit of meritorious defense in support of a motion to set aside a default in an action on two promissory notes, which stated that plaintiff was indebted to affiant in a certain sum but which did not disclose how the indebtedness arose nor what the facts were, *held* to state a legal conclusion and to be insufficient to show the right of set-off.

3. JUDGMENT, § 153*—*when default not vacated to let in plea of set-off.* As a general rule a default will not be vacated on affidavits merely to let in a plea of set-off, as the defendant has a perfect remedy by bringing suit against the plaintiff on the set-off.

4. APPEAL AND ERROR, § 413*—*when question as to insufficiency of sheriff's return upon summons not considered on appeal.* A defendant who enters his appearance to make a motion to set aside a judgment by default cannot raise for the first time on appeal the question as to a defect in the return of the sheriff upon the summons.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. D. Chemical Company, Appellant, v. Walter Teel, Appellee.

Gen. No. 6,165. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916.

Statement of the Case.

Action by W. D. Chemical Company, plaintiff, against Walter Teel, defendant, on a written contract for the purchase of merchandise. From a judgment for defendant plaintiff appeals.

KEITHLEY & KEITHLEY, for appellant.

C. N. BARNES and SHELTON MCGRATH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. PAYMENT, § 6*—*when giving of note for pre-existing indebtedness constitutes payment.* The making a note for a pre-existing debt constitutes payment thereof where it is expressly agreed that it shall be in payment of the debt and the creditor subsequently sells the note to a third person.

2. PAYMENT, § 29*—*when evidence insufficient to establish that note given in payment of debt was a forgery.* In an action for the purchase price of merchandise under a contract, where it appeared that a note given in payment of the debt was transferred to a third person and suit brought against defendant, in which defendant pleaded the general issue, forgery and another special plea, and a verdict of no cause of action was rendered in defendant's favor, and defendant could have proved several defenses under the issues, including that of forgery, in the absence of proof as to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

what particular defense was relied upon in the suit on the note, evidence *held* insufficient to sustain a finding that the jury found in the trial of the suit on the note that it was a forgery.

3. TRIAL, § 68*—*when offer of proof insufficient.* An offer of proof which does not disclose what the answer is expected to be is insufficient.

June E. Mills, Appellee, v. Village of Oquawka, Appellant.

Gen. No. 6,167. (Not to be reported in full.)

Appeal from the Circuit Court of Henderson county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by June E. Mills, plaintiff, against Village of Oquawka, defendant, to recover damages for personal injuries due to falling through a defective wooden portion of a brick sidewalk into a cellar. From a judgment for plaintiff for $2,000, defendant appeals.

On May 16, 1914, the husband of June E. Mills occupied a part of the Graham building in the Village of Oquawka, in Henderson county, as a bakery. There was a brick sidewalk, ten or twelve feet wide, in front of this building, and at one time there had evidently been a stairway leading from this sidewalk down to a cellar underneath, but its use for such a purpose had been abandoned many years before the date named, the stairs had been removed, and the opening in the sidewalk leading to the stairs had been covered with the wooden door. On the evening of the day in ques-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tion a wheelbarrow was standing on this wooden door, having been left there by Mills, as he intended to use it during the night for the purpose of transferring bread to the depot for shipment on an early morning train. Between seven and eight o'clock that evening several persons were sitting on that wheelbarrow, when the wooden door gave way and they were all precipitated into the cellar. The evidence shows that June E. Mills, who was one of those thrown into the cellar, was quite seriously injured.

At least two years before this accident, a member of the village board put the end of his cane through a rotten hole in one of the planks composing this wooden cover, and in spite of his knowledge of the condition of this part of the public sidewalk, he testified that to his knowledge the place had never been repaired while he was on the board nor up to the time of the accident. Other witnesses testified to an entire lack of repairs on this place for nineteen years or longer. Certain pieces of timber were admitted in evidence and identified by at least one witness as being part of the supports of this wooden cover. These timbers were rotten. Other evidence was introduced to show that this wooden portion of the walk was in an unsafe condition for public travel. The evidence further showed that the city had been notified of the condition of this walk by complaint to the mayor or president of the village board with a request from plaintiff that the walk or that portion of it be condemned and removed. This complaint was ignored, apparently without any investigation on the part of the village officials.

There seemed to be no question but that plaintiff was injured by her fall. She complained of an injury to her arm and neck and she suffered a miscarriage shortly after the accident. She was under the care of two physicians for a considerable time after the accident.

JAMES W. GORDON and SCOFIELD, HELFRICH & CALIFF, for appellant.

HARTZELL & CAVANAGH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1098*—*when evidence sufficient to sustain finding that city guilty of negligence in failing to inspect sidewalk and wooden supports.* In an action against a city for damages for personal injuries due to the falling in of the wooden portion of a brick sidewalk over an old cellar, while plaintiff was sitting with others on a wheelbarrow located on such portion of the sidewalk, evidence *held* sufficient to sustain a finding that defendant was guilty of negligence, not only in failing to inspect the sidewalk but also the supports underneath the sidewalk.

2. MUNICIPAL CORPORATIONS, § 1063*—*when person sitting on wooden walk of which complaint was made to city not guilty of contributory negligence.* One who makes a complaint to a city of the defective condition of a board walk over an old cellar is not guilty of contributory negligence in sitting upon a wheelbarrow situated on such walk with others where she has no knowledge of the defective condition of the supporting timbers, which gave way and precipitated her into the cellar.

3. APPEAL AND ERROR, § 1241*—*when party procuring instruction and offering refused instruction may not complain of similar instruction for adverse party.* A party procuring an instruction and proffering another instruction which is refused, both of which are similar to another instruction given for the adverse party, may not complain of such instruction given for the adverse party.

4. MUNICIPAL CORPORATIONS, § 1101*—*when requested instruction in action for negligent injuries from defective sidewalk properly refused as inapplicable to facts.* In an action for damages for personal injuries sustained as the result of the falling of a board portion of a brick sidewalk over an old cellar, while plaintiff with five other persons were sitting on a wheelbarrow on such board portion of the sidewalk, a requested instruction that if the jury believed from the evidence that this portion of the sidewalk broke because six people were on it then there could be no recovery, *held* correctly refused as being inapplicable to the facts.

5. MUNICIPAL CORPORATIONS, § 995*—*when wooden sidewalk sufficient.* A wooden sidewalk should be in such condition that if people stood on every portion of it they would be supported.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

6. DAMAGES, § 114*—*when verdict for personal injuries to woman not excessive.* A verdict for $2,000 in favor of a woman who complained of an injury to her arm and neck and who suffered a miscarriage, and was under the care of two physicians for some time after the accident, *held* not excessive.

Town of Magnolia, Appellant, v. Mark Kays, Appellee.

Gen. No. 6,169.

JUDGMENT, 175*—*what is valid form of judgment for defendant after verdict in ordinary common-law action.* The valid form of a judgment for defendant after verdict in an ordinary common-law action is that it is considered by the court that the plaintiff take nothing by his suit and that defendant go hence without day, or other equivalent words, with a judgment for costs and execution therefor.

Appeal from the County Court of Putnam county; the Hon. IRVING E. BROADDUS, Judge, presiding. Heard in this court at the October term, 1915. Appeal dismissed. Opinion filed February 8, 1916.

GEORGE W. HUNT, for appellant.

HENRY E. JACOBS and JAMES E. TAYLOR, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

In this suit by the Town of Magnolia against Mark Kays in the County Court of Putnam county to recover a penalty for the obstruction of an alleged private road, the jury found the defendant not guilty and, after the denial of a motion for a new trial, the court entered

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the following judgment: "Judgment on verdict and against plaintiff. And this cause having been instituted at the relation and upon the complaint of Amos B. Wilson and said Amos B. Wilson having entered himself as surety for costs herein, it is adjudged that said Amos B. Wilson as such surety, pay the costs of this suit." The Town and Wilson gave a bond upon an appeal to this court.

Is the above a valid and final judgment? We have had occasion to discuss unusual forms of judgments for plaintiffs and for defendants on pleadings, and the conclusions we reached in those cases and the authorities relied upon are sufficiently set forth in *Bennett v. Karasik,* 164 Ill. App. 362; *Ajax-Grieb Rubber Co. v. Gray,* 179 Ill. App. 377; and *People v. Johnson,* 179 Ill. App. 467. Those authorities do not necessarily apply to the present question, which is, what is the proper form for a judgment for a defendant upon a verdict in his favor? Cooley's Blackstone, book 3, page 399, says that the form is that the defendant go thereof without day, *eat inde sine die,* that is, without any further continuance or adjournment, the King's writ commanding his attendance being now fully satisfied. In an appendix to said book 3 are forms of law records, including judgments for defendants that plaintiff take nothing by his writ and that defendant go thereof without day, and the like. 1 Bouvier's Law Dictionary (4th Ed.) title "Judgment," says that the language of such a judgment is that it is considered by the court that the defendant do go without day, and, under the same title in another place, that, where an issue arises upon a declaration or a peremptory plea and this is decided in favor of the defendant, the judgment is that plaintiff take nothing by his writ and that the defendant go thereof without day. The late edition of the same work states the same thing in somewhat different language. 1 Black on Judgments, sec. 14, says that

if the verdict is for the defendant upon the merits, the judgment is *nil capiat per breve* or *per billam,* that is, that the plaintiff take nothing by his writ or declaration. In 12 Am. & Eng. Encyc. of Law (1st Ed.) page 61, the same form is announced. The second edition of the same work does not give the form in such a case, but refers to 11 Encyc. of Pl. & Pr. 925, where the technical language of such a judgment for defendant is said to be: "It is considered by the court that the plaintiff take nothing by his writ and that the defendant go hence without day." In 23 Cyc. 670, it is said that where issues of fact have been found by a jury for defendant, the judgment should be that plaintiff take nothing by his writ or declaration. To the same effect is Puterbaugh's Common Law Pleading and Practice (8th Ed.) 895. In *Boggess v. Cox,* 48 Mo. 278, the approved form was said to be: "It is by the court considered and adjudged that plaintiff take nothing by his writ and that defendant go thereof without day and recover of the plaintiff his costs." In *People v. Severson,* 113 Ill. App. 496, where many authorities are discussed, it is held that the form of a final judgment for defendant on verdict is that it is considered that the plaintiff take nothing by his suit and that the defendant go thereof without day. In *Lee v. Yanaway,* 52 Ill. App. 23, it was held that the question whether a judgment was final is not to be determined from the mere fact that costs and execution thereof are adjudged against one of the parties, that costs are an incident to a final judgment, but that whether the judgment is final or interlocutory is to be determined from other considerations; that it must, to be final, terminate and completely dispose of the action. Similar language is used in *Wenom v. Fossick,* 213 Ill. 70, though the judgment there involved was on demurrer. A judgment for costs may be entered when no final judgment between the parties has been reached. In some of the authorities we have above cited there are expressions indicat-

ing that a judgment for costs for defendant makes the judgment final. There are authorities in other jurisdictions to that effect. Best's Encyc. of Common Law Orders gives many forms which only give the defendant a judgment for costs after verdict in his favor. Notwithstanding the authorities last mentioned, we are of opinion that in this State the valid form of a judgment for defendant after verdict in an ordinary common-law action is that it is considered by the court that the plaintiff take nothing by his suit and that defendant go hence without day, or other equivalent words, with a judgment for costs and execution therefor.

It follows that no final judgment has been entered in this case. The appeal must therefore be dismissed with leave to appellant to withdraw record, abstracts and its briefs.

Appeal dismissed.

Sarah French Miller, Appellee, v. Albert V. Thomas et al., Appellants.

Gen. No. 6,173.

1. DAMAGES, § 57*—*what is measure of damages for breach of contract to repurchase unsold land from vendee.* Where land is sold by one person to another and a deed to other land and a contract for repurchase of the latter land taken as part payment of the purchase price, under which contract of repurchase the vendor of such latter land agrees to sell it for the vendees for a stipulated price within one year, and, if he fails to do so, to repurchase it at such price, the measure of damages for refusal to repurchase such latter land at the expiration of one year, after tender of a deed, is the contract price.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

2. ASSUMPSIT, § 23*—*when recovery may be had on common counts for money due.* Where a contract has been fully executed and nothing remains to be done but to pay the amount specified, a recovery may be had under the common counts for money due.

3. PLEADING, § 161*—*when defendant limited to defenses in affidavit of merits.* A defendant is confined to the defenses set up in an affidavit of merits.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

SHELTON MCGRATH and C. W. HEYL, for appellants; FRANK J. QUINN, of counsel.

MCROBERTS, MORGAN & ZIMMERMAN, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Sarah French Miller sold and conveyed real estate in Peoria to Irene M. Thomas and took in part payment a deed of certain real estate in Mississippi, together with a contract back from Mrs. Thomas and her husband, Albert V. Thomas, concerning the same land, dated April 25, 1913, the body of which was as follows:

"Having sold to Sarah French Miller the property situated in Harrison County, Mississippi, and described as the West Half of the Southwest Quarter of Section Two (2) in Township Six (6) South, of Range Twelve (12) West, I hereby agree and guarantee, as part of the consideration in said sale, to resell said property for said Sarah French Miller within one year from date hereof, for not less than $1,600.00 to her upon terms of at least one-half cash, balance in one, two and three years, with 6% interest.

"I hereby further covenant and agree, for the consideration above guaranteed, that in case I shall fail to sell said above described land to some third person

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

within said period of one year, at the price aforesaid, I shall then, immediately at the expiration of said period, myself purchase said land from said Sarah French Miller at said price of $1600.00 and upon said terms.

"Said Sarah French Miller shall not be bound to sell at said price, but should she decline a bona fide offer of purchase as hereinbefore provided, or should she decline to sell said land to me at the expiration of said period as above provided, then upon such declination this guaranty shall cease."

Mr. and Mrs. Thomas did not resell said land within one year nor did they repurchase the same from her at the end of the year. Mrs. Miller and her husband thereupon executed and acknowledged a warranty deed of said premises to Albert V. Thomas, who was the agent of his wife, and caused the same to be tendered to him, and he refused to receive the deed and refused to pay the money. Then this suit was brought to recover the purchase money, and plaintiff filed a declaration containing the special count, setting out the contract *in haec verba,* another special count declaring on the instrument according to its legal effect, and the consolidated common counts, to which was attached an affidavit by plaintiff that there was then due her from the defendants under said contract $1,634.66. Defendants filed a plea of nonassumpsit with an affidavit of merits. The cause was tried by a jury and plaintiff had a verdict for $1,634.66, a motion for a new trial was denied and plaintiff had judgment for that amount and defendants appeal.

Appellants contend that the measure of damages in such a case is the difference between the contract price and the fair market value, and that as the proof is that this land is worth $1,600, only nominal damages could be recovered. In *Gray v. Meek,* 101 Ill. App. 463, and 199 Ill. 136, it was held that said rule was not applicable to such a case. There Gray, as the agent of Meek,

had the exclusive right by contract to sell certain lots for one year at certain prices, and if any lots remained unsold at the end of one year, Gray was to buy such remaining lots and Meek was to sell them to him at the above prices. Afterwards there was a written extension of the contract. Certain lots remained unsold and Meek sued Gray, first, for certain moneys withheld on lots which had been sold and, second, for the agreed price for the lots remaining unsold. Gray set up that the true measure of damages was the difference between the agreed price and the fair market value. This contention was held not tenable. Meek recovered the entire consideration for the lots not sold. The payments were in instalments and no tender of a deed had been pleaded and there was no sufficient proof of a tender. The court held that Meek could recover all the instalments except the last, but could not recover the last instalment because he had not pleaded and proved tender of a deed. He entered a remittitur in the Supreme Court for the amount of the last instalment and the judgment was affirmed as to the balance. It is argued here that the case does not apply, because there presumably Gray had possession. It will be seen, however, by reading the contract as set out in the Appellate Court opinion, that Gray was not to exercise any right of ownership or have any interest in the real estate by reason of that agreement. This case of *Gray v. Meek* has never been overruled so far as we are advised, and is therefore controlling on the right to recover.

Appellants contend that the special counts declare for damages and not for the money due under the contract, and therefore only nominal damages could be recovered. If there is any defect in the conclusion of these special counts, which we do not concede, yet the common counts sought a recovery for money due. This contract had been wholly executed and nothing re-

mained to be done but to pay the amount specified. In such a case a recovery may be had under the common counts. *Bauer v. Hindley,* 222 Ill. 319. Appellants contend that if they are liable to pay this $1,600, they are only liable by the terms of the contract to pay $800 at the end of the year and the balance at one, two and three years with six per cent. interest. The year ended April 24, 1914, and the suit was begun July 28, 1914, and appellants contend that therefore only $800 could be recovered in this suit. Appellee contends that the true construction of the contract is that the whole sum was due her at the end of the year. Assuming that appellants are right as to the time within which they could pay, still they cannot avail of this defense in the present condition of the pleadings. Appellee filed with her declaration an affidavit showing the nature of her demand and the amount claimed to be due her. In such case section 55 of the Practice Act (J. & A. ¶ 8592) required defendants, in order to avoid a default, to state that they verily believed that they had a good defense upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount, and specifying the nature of such defense. Albert V. Thomas filed an affidavit with the plea of the defendants in which he stated that in making such affidavit he was acting for himself and as agent for Irene Thomas; that he verily believed that defendants had a good defense upon the merits to the whole of the plaintiff's demand, and that the nature of the defense was that plaintiff did not tender a deed to the premises referred to, but offered to deliver some sort of a writing provided defendants would pay the plaintiff $1,600, and that plaintiff has never offered or been willing to deed to defendants said premises according to the terms of the writing, and that plaintiff has not suffered any damages on account of any failure or refusal of the defendants. Under *Allen v. Watt,* 69 Ill. 655; *Haggard*

v. Smith, 71 Ill. 226; *Mayberry v. Van Horn,* 83 Ill. 289; *Henry v. Meriam & Morgan Paraffine Co.,* 83 Ill. 461; and *Kadison v. Fortune Bros. Brewing Co.,* 163 Ill. App. 276, appellants were confined to the defenses set up in said affidavit. The defense that appellee had not suffered any damages has already been disposed of. The remaining defense was that there was no tender of a deed. The tender of the deed was duly shown. Although the last instalment might not have been due when that tender was made, yet appellee could not demand the whole amount without tendering the deed. The affidavit did not set up that some of the instalments were not due, but only that the deed was not tendered in accordance with the contract. Defendants did not offer to pay $800, and they did not set up the affidavit that only $800 was due. The deed was tendered and was offered in evidence, and the only defense so set up was not maintained.

The judgment is therefore affirmed.

Affirmed.

MR. JUSTICE NIEHAUS took no part.

Mary E. Douvia, Appellee, v. City of Ottawa, Appellant.

Gen. No. 6,189.

1. MUNICIPAL CORPORATIONS, § 985*—*when duty of city to protect public against excavations in street.* It is the duty of a city to protect the public against an excavation made in a public street by a contractor.

2. MUNICIPAL CORPORATIONS, § 990*—*when city must take notice of excavation in streets.* A city must take notice of an excavation in a street made by a contractor.

3. MUNICIPAL CORPORATIONS, § 1107*—*when sufficiency of barriers and lights about excavation made by contractor in streets question for jury.* In an action against a city for damages for personal injuries sustained as a result of driving at night into an excavation made in a public street by a contractor, where it appeared that the lights were burning two hours before the accident but that they were not burning shortly before the accident, and that the lamps when lighted after the accident either would not burn or would go out immediately, *held* that it was a question for the jury whether the barriers and lights were sufficient.

4. DAMAGES, § 116*—*when verdict for personal injuries not excessive.* A verdict for $3,000 in favor of a woman who previously to an accident had been in good health and had never employed a physician, and who was badly bruised as a result of the accident, contracted pneumonia, and never regained her former condition of health, *held* not excessive.

5. TRIAL, § 91*—*when objections to form of questions insufficient.* Objections to the form of questions claimed to invade the province of the jury are insufficient when general in character.

6. APPEAL AND ERROR, § 1507*—*when overruling of objections to form of questions invading province of jury harmless error.* The overruling of objections to the form of questions claimed to invade the province of the jury is harmless error where the jury could not have found otherwise if the questions had not been asked.

7. INSTRUCTIONS, § 151*—*when refusal of instructions covered in charge not erroneous.* It is not error to refuse proffered instructions sufficiently covered in the general charge.

8. INSTRUCTIONS, § 18*—*when misleading instructions properly refused.* Instructions which are calculated to mislead the jury are properly refused.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

9. NEGLIGENCE, § 237*—*when instruction properly modified.* In an action for damages for personal injuries negligently caused, an instruction *held* properly modified by changing the expression "the cause of the accident" to "the proximate cause of the accident."

10. MUNICIPAL CORPORATIONS, § 1100*—*when instruction in action for personal injuries on sufficiency of lights about excavation properly modified.* In an action against a city for damages for personal injuries sustained as a result of driving into an excavation in a street at night which was insufficiently guarded and lighted, a requested instruction that would have relieved defendant from liability upon its placing at the excavation two or three red lanterns, without regard to their power or efficiency, *held* properly modified by the insertion of the words "and were a sufficient and adequate warning of the ditch and its position on said street."

11. INSTRUCTIONS, § 105*—*when requested instruction giving form of verdict proper.* A requested instruction giving a form of verdict if the jury found for the party proffering it, *held* proper.

12. APPEAL AND ERROR, § 1712*—*when error in refusal of instruction waived by failure to argue assignment.* Any error in the refusal of a proffered instruction is waived where such question, although assigned for error, is not argued.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916.

TAYLOR STRAWN, for appellant; MCDOUGALL & CHAPMAN, of counsel.

DUNCAN & O'CONOR and BUTTERS & CLARK, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

About 9:30 p. m. of April 2, 1913, appellee was riding west on Jefferson street in the City of Ottawa in a single seated top buggy, drawn by a span of horses driven by a young man of her acquaintance who was sitting at her right hand. She was being driven from the center of Ottawa to her home in the western part.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

A high wind was blowing, accompanied by thunder and lightning, and the night was very dark. At a certain place in Jefferson street a trench had been dug from the north curb line to the center of the street for a sewer to connect with a school building north of the street, and also for a water main. The witnesses differ some as to the width and depth of the excavation, but it is sufficient to state here that it was probably six or seven feet deep and about four feet wide. Some barriers had been placed about the opening, and three red lanterns had been placed there at five o'clock that afternoon. The red lights were not burning at 9:30 p. m. and there was no street lamp near, and the driver of the team did not see the excavation, but drove into it. The horses went into the ditch and in some way turned to the north, so that they were in line with the ditch, and when the accident was over they were both on the same side of the buggy tongue. Appellee went down between the horses with her head near their feet. She was taken out unconscious and removed to a neighboring house and from there to a hospital, and proved to be seriously injured, and had pneumonia as a result of the exposure. She brought this suit against the city to recover damages for her injuries, and upon a trial had a verdict and a judgment for $3,000, from which the city prosecutes this appeal.

The legal principles fixing the duty of a city to protect the public against such an excavation, whether dug by the city or by a contractor, and requiring the city to take notice of such an excavation in its streets, are laid down in *City of Chicago v. Gallagher*, 44 Ill. 295; *City of Springfield v. LeClaire*, 49 Ill. 476; *City of Chicago v. Johnson*, 53 Ill. 91; *City of Sterling v. Thomas*, 60 Ill. 264; *City of Chicago v. Brophy*, 79 Ill. 277. The principal defense of the city is that at five o'clock that night two laborers, Nick Kozwich and Marcus Yakowich, placed barriers around the excavation and

lighted and put up three red lanterns, which were burning well when they left, and that thereby the whole duty of the city to the public for that night had been performed, and therefore the city is not liable to appellee. About 7:15 that evening a witness passed in sight of that place and saw that there were two red lights burning. Some little time before the accident two men passed near the excavation and saw that no lights were burning. There were no lights burning as appellee reached this place. After the accident several people came there, including one or more officers of the city, and an effort was made by more than one person to relight the lanterns, and it was found that they would not burn, or would go out almost immediately. The lanterns were intact. This evidence tended to show either that the lanterns were not properly supplied with the right kind of oil, or that the wicks were defective. The city could have caused the lamps to be preserved and presented in evidence, but this was not done. Manifestly, appellee was in no condition to examine or preserve the lanterns. The jury were the judges whether sufficient barriers had been erected or sufficient lights had been provided to protect the public on that stormy night. We see no reason to disturb the conclusion of the jury that the city is liable.

It is contended that the damages are excessive. Appellee up to that time was in good health. She had never required the services of a physician. She was very badly bruised. She had pneumonia as the result of the exposure, and had never recovered her former condition of health. Without stating minutely her physical condition from that time on, as detailed in the evidence, we think it sufficient to say that we do not feel warranted in disturbing the award of the jury.

Certain questions were put to a physician, who attended appellee after the injury and who also testified as an expert, which appellant contends left to the witness the very questions which the jury were to de-

cide. In the main the objections were not well founded, but it is an answer to them all that the objections in the trial court were general only and did not call attention to the definite form of the questions, which could and would, no doubt, have been modified, if the point had been called to the attention of court and counsel. Moreover the jury could not have found otherwise if these questions had not been asked, nor were the answers particularly specific. For example, the physician was asked if certain conditions in his opinion were permanent. He did not reply that they were, but in effect that it was difficult to tell; they might or they might not be. We are of opinion that no reversible error is shown by the abstract in this case on that subject.

The court gave two instructions requested by plaintiff, both relating to the measure of damages. It is not claimed there is any defect in them. The court gave without modification seventeen instructions requested by appellant and modified two instructions requested by appellant and refused nine. Of the refused instructions, we think it sufficient to say that those which stated correct rules of law were sufficiently embodied in the given instructions, and some of them stated the responsibility of the city less strongly than the foregoing authorities required. Some of them were so worded that they were calculated to mislead the jury. The ninth instruction changed the expression "The cause of the accident" to "the proximate cause of the accident." We approve of that modification. The third instruction requested by defendant would have relieved appellant of liability upon its placing at the ditch in question that night two or three red lanterns, without regard to the power and efficiency of those lanterns. The court modified this by inserting the words, "and were a sufficient and adequate warning of the ditch and its position on said street." The authorities above cited, in our opinion,

justified that requirement. Instruction No. 30, requested by appellant and refused, gave a form of verdict if the jury found for the defendant. It should have been given. The bill of exceptions certifies that it contains all the instructions and it contains no instruction for either party as to the form of the verdict, but the verdict which was returned shows that the jury were able to form a verdict, and we cannot believe that if they had wished to return a verdict for the defendant, they would have been unable to form it. Moreover, though the refusal of this instruction is assigned for error, it is not argued and it is therefore waived.

We find no reversible error in the record, and the judgment is therefore affirmed.

Affirmed.

Frances Mertel, Defendant in Error, v. Charles F. Walter, Plaintiff in Error.

Gen. No. 6,191. (Not to be reported in full.)

Error to the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916.

Statement of the Case.

Action by Frances Mertel, plaintiff, against Charles F. Walter, defendant, to recover earnest money paid in pursuance of an alleged contract for the purchase of real estate, which was finally abandoned. From a judgment for plaintiff, defendant brings error.

CHARLES HELMIG and BUTTERS & CLARK, for plaintiff in error.

SCANLAN & MASSIEON, for defendant in error.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 205*—*when question of what constitutes for court.* The question whether all the letters relative to the sale and purchase of real estate constitute a complete contract is for the court.

2. CONTRACTS, § 44*—*when there is no meeting of minds so as to constitute.* There is no meeting of the minds of parties to negotiations for the purchase of real estate so as to constitute a contract where an offer to purchase by letter accompanied by a payment of a certain sum is met by the introduction of new conditions which are not accepted by the purchaser, and the latter also in a subsequent letter introduces new conditions which the vendor does not accept, but requests a verbal conference, which is agreed to by the purchaser, but the latter, without the holding of any conference, demands the return of the earnest money.

Mary E. Stauber, Appellee, v. Leo Stauber et al., Appellants.

Gen. No. 6,194.

1. VENUE, § 14*—*when petition for change of filed in apt time.* Under Hurd's Rev. St. ch. 146, secs. 6, 7 (J. & A. ¶¶ 11492, 11493), a petition for change of venue on account of prejudice of judges filed at the first term at which a summons is returnable and less than ten days after the information upon which the application is based comes to the petitioner is in apt time.

2. VENUE, § 12*—*who is not a defendant who must consent to change of.* A person named as defendant but who has not been served with summons and who has not entered an appearance is not a defendant whose consent is necessary to a change of venue under Hurd's Rev. St. sec. 9 (J. & A. ¶ 11495), requiring the consent of all defendants where there are two or more defendants.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

3. VENUE, § 24*—*when granting change of is imperative.* Where a proper application for change of venue is made, the granting thereof is imperative, and not discretionary with the court.

4. APPEAL AND ERROR, § 1772*—*when refusal of change of venue ground for reversal.* The refusal of a proper application for change of venue is ground for reversal.

5. VENUE, § 31a*—*what is effect of proper application for change.* Where a proper application for change of venue is made, questions which arise after the improper denial of the motion for change of venue are not proper to be considered by the court.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded with directions. Opinion filed February 8, 1916.

BUTTERS & CLARK, for appellants.

BOYS, OSBORN & GRIGGS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is an action of debt brought in the Circuit Court of La Salle county by Mary E. Stauber against Leo Stauber, the principal, and four sureties upon a bond given to secure the payment of instalments of alimony in a divorce case, and which is the bond referred to in *Stauber v. Stauber*, 168 Ill. App. 179. Leo Stauber filed a petition for a change of venue from two of the three judges of that circuit and it was heard and denied by one of said two judges, who thereafter heard all further proceedings in the case terminating in a judgment for plaintiff, from which all defendants who were in court prosecute this appeal. The first question is whether the petition for a change of venue was properly denied.

(1) It is argued that said petition was not filed in apt time. Sections 6 and 7 of the statute in relation to changes of venue (J. & A. ¶¶ 1492, 1493) provide that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

no such application after the first term shall be allowed unless the applicant gives the opposite party ten days' previous notice, except where the causes have come to the knowledge of the applicant less than ten days before making the application; and that no such change shall be granted after the first term at which the party might have been heard, unless certain other things shall have been shown. This suit was begun September 22, 1913, and the summons was returnable on the first day of the October term, 1913, which was the second Monday, or October 13, 1913. On October 14th, the defendants, except Katherine Conness, filed a demurrer to the bill. On December 20th said demurrer was set to be heard on December 29, 1913. On December 27, 1913, at said October term, Leo Stauber filed his petition for a change of venue from said two judges and filed therewith the consent of certain defendants, and the court on the same day heard and denied the same. A bill of exceptions was taken, setting forth the proceedings relating to the change of venue. It is not questioned but that the petition is in due form. All the proceedings relating to the change of venue were at the first term, at the term to which the summons was returnable. The case was then pending on a demurrer to the declaration. The petition stated that the knowledge of the prejudice of the judges had come to the petitioner since December 20, 1913, and less than ten days before the filing of the petition. We fail to see why, under the statute referred to, the application was not in apt time. In that respect it contained more than the statute required.

(2) Section 9 of the statute referred to (J. & A. ¶11495) provides that where there are two or more plaintiffs or defendants, a change of venue shall not be granted except with the consent of all the parties, plaintiffs or defendants as the case may be. The defendant, Katherine Conness, did not consent to the ap-

plication for a change of venue. It is argued that for that reason the change was properly denied. Katherine Conness was not served with summons. She did not enter her appearance. She was not before the court. No proceeding in the cause could bind her. Was her consent necessary to the application of Leo Stauber for a change of venue? In *Hitt v. Allen*, 13 Ill. 592, one defendant had been defaulted. Thereafter the other defendant applied for a change of venue and did not have the consent of the defaulted defendant. It was held that the statute requiring all defendants to join in the application must be understood as applying only to those defendants between whom and the plaintiff a cause is pending wherein a trial is to be had. In *Donahue v. Egan*, 85 Ill. App. 20, a judgment by confession had been entered against two defendants and afterwards one of them got leave to plead and did plead to the declaration. Thereafter he asked a change of venue. His codefendant objected to the change of venue and the application was refused. We there held that the defendant who was objecting was not a party to the trial between the plaintiff and the other defendant, and that therefore his consent or objection was not material, and that it was reversible error to refuse the change of venue. In 40 Cyc. 146, it is said that in a petition by one or more defendants for a change of venue, it is not necessary to join those defendants who have not been served and who have not appeared. In *Myerhoff v. Tinslar*, 175 Ill. App. 29, where one of several defendants was not served and did not appear, we held that the word "defendants" in the verdict and in the judgment was confined in its application to those who by their own act or by the act of the law had been made the subjects of jurisdiction. We there cited a number of authorities so holding. We therefore hold that a person who had been named as a defendant but who had never been served with summons nor entered

an appearance was not a defendant whose consent was necessary under the statute.

(3) It is argued that no error afterwards intervened to the prejudice of appellants and that therefore this judgment should not be reversed, even if it was error to deny a change of venue. *Goodwin v. Goodwin*, 65 Ill. 497, is cited in support of this contention. We are unable to find that that case has ever since been cited upon this subject by the Supreme Court. The contrary doctrine has frequently been announced in this State. In *Clark v. People*, 2 Ill. (1 Scam.) 117, the Supreme Court said that when the accused brought himself within the requirements of the statute for a change of venue, the obligation of the court to allow it is imperative and admits of the exercise of no discretion. In *Walsh v. Ray*, 38 Ill. 31, it was held that when the requirements of the statute for a change of venue have been observed, the mandate of the statute is peremptory, and the court must grant the change. In *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 106, decided since *Goodwin v. Goodwin, supra*, the court used language very applicable to appellee's contention here. A change of venue requested by defendant had been refused. The court held that the petition and notice conformed strictly to the statute and that the granting of the change was not discretionary and that the court erred in not allowing it. The case had been tried in the court below and resulted in a judgment against defendant, and the appellee, insisted that the defense had no merit. The court said that even if that were true, the right to a change of venue was secured to the party by the statute, and it must be obeyed. The court further said: "If a reversal in this case works a hardship, appellees should have permitted the change of venue to be made without opposition. They saw the petition and notice, and must have known that they were strictly in conformity to the statute, and entitled appellant to a change of venue. Hence they have con-

tributed to produce the hardship of which they now complain. Counsel must have known that it was error to refuse the motion, and hence should have yielded to the change of venue, but, failing to do so, he cannot urge us to relieve him against the error he has procured in the record." In the recent case of *Feigen v. Shaeffer*, 256 Ill. 493, the court reversed the case for failure to grant a change of venue and declined to consider the other errors assigned. This seems to mean that if the other errors were not well assigned, still a reversal must be granted because of the denial of the change of venue. The court there held that on a proper application, the change must be granted. *Glos v. Garrett*, 219 Ill. 208; *Miehle Printing Press & Manufacturing Co. v. Arkulas*, 131 Ill. App. 461. The argument that no other error intervened is accompanied by the admission that the judgment is for substantially too large an amount. The appellee offers to cure this by remittitur. We are of opinion that the refusal of the change of venue was a denial of a substantial right, and that the questions which arose after the change of venue was denied should be submitted to a judge from whom a change of venue was not asked. It is true that applications for changes of venue often appear unjust to the judge against whom they are made and appear to him to be made in fact for delay only. If any remedy is required, however, it must be sought in the Legislature.

For the failure to grant a change of venue, the judgment is reversed and the cause remanded, with directions to grant the change of venue and to rescind all orders made after the petition for the change of venue was filed.

Reversed and remanded with directions.

W. H. Coffey, Public Administrator, Appellee, v. Della Mann, Administratrix, Appellant.

Gen. No. 6,202.

1. DOMICILE—*when evidence sufficient to show residence in another State.* Evidence *held* sufficient to sustain a finding that a decedent was a resident of another State, where his family lived, and not of Illinois, where he died and had been engaged in transacting considerable business.

2. EXECUTORS AND ADMINISTRATORS, § 30*—*when creditor not entitled to preference in administration.* Under the Administration Act, sec. 18 (J. & A. ¶ 66), a creditor is not entitled to preference in administration of the estate of a nonresident over the public administrator, but the public administrator is preferred to all except the widow, husband and next of kin resident in this State.

Appeal from the Circuit Court of Knox county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

B. E. MCLAUGHLIN and MARSH & MARTIN, for appellant.

FLETCHER CARNEY, JAMES W. CARNEY and SIG. B. NELSON, for appellee; CHESTER I. LONG, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Leslie C. Roberts died intestate at Galesburg, Knox county, Illinois, on March 10, 1915, leaving surviving him as his sole heirs at law his wife, Eunice Roberts, and an invalid son, Henry Roberts, both of whom lived in Wichita, Kansas, and leaving in Illinois a deposit in a bank in Galesburg and an automobile. The next day after his death Della Mann, claiming to be a creditor, took out letters of administration upon the estate of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

deceased in the County Court of Knox county. On March 19, 1915, W. H. Coffey, public administrator of Knox county, filed a petition in said County Court alleging that Roberts was a resident of Wichita, Kansas, and asking that the letters to Della Mann be revoked and that letters be issued to him as the public administrator. The County Court heard and denied said petition. Coffey appealed to the Circuit Court, where, upon a hearing, the letters to Della Mann were revoked and Coffey as public administrator was appointed to administer said estate. This is an appeal by Della Mann from that order.

The principal question litigated is whether Roberts was a resident of Illinois or of Kansas. The proofs introduced by the public administrator showed that Roberts owned a house in Wichita which he maintained and in which his wife and son resided. A brother of Mrs. Roberts, living for very many years in Galena, Illinois, testified that twenty-three years ago he visited the family in Wichita and that Roberts then lived there with his wife and son, and that he had never heard of any separation between them. A banker at Galesburg testified that Roberts always spoke of Wichita, Kansas, as his home; that Roberts kept a deposit in a bank in Galesburg, but that most of his banking business was done at Wichita, Kansas. A lawyer of Galesburg, who had done considerable business for Roberts, testified that Roberts gave him his address as Wichita, Kansas, and whenever he wrote to him when Roberts was not at Galesburg, he addressed him at Wichita, Kansas. He testified that Roberts directed him to bring a suit against a certain party and he told Roberts that he would probably be compelled to give a bond for costs and Roberts said he knew that. The witness started the suit, the defense made an application to compel Roberts to give a bond for costs, based on an affidavit that Roberts was a nonresident of the State of Illinois; that Roberts did give such bond and

that on the trial of that case, only three or four months before Roberts died, he testified that he lived in Wichita, Kansas. The attorney for the defendant in that case testified that some two years or more before that time, he met Roberts on a train in the west and Roberts told him that he lived in Wichita. The agent for the Santa Fe Railway in Galesburg testified that he had met Roberts and his wife at the station in Wichita; that at times Roberts purchased a ticket at Galesburg for Wichita and generally said that he was going home; that not many months before his death he bought a ticket for Carrolton, Missouri, and said that he was going to stop there on his way home. Just three months before he died he entered into a contract for the erection of two cottages in Galesburg and therein described himself as "L. C. Roberts of Wichita, Kan." Some intimation having been made of domestic trouble between Roberts and his wife, the petitioner introduced in evidence a number of letters, written by Roberts to his wife from Galesburg during the last two months of his life, the signatures to which were proven. In those letters he told his wife in detail various transactions he was having in various parts of Illinois, expressed interest in the health of his wife and son, stated the condition of his own physical ailments, urged his wife to go to a dressmaker and get work of that kind done before spring, expressed satisfaction later that she had done as he suggested, told how he had fixed the water pipes in the house to prevent their freezing, and in several of them said that if he could complete a certain important business deal, he should be home very soon. The letters contained several references to his coming home soon. These letters and some other evidence show that he was engaged in the business of dealing in Illinois and Kansas lands. The proof introduced by Della Mann is that she and her sister, Sadie Mann, and their mother had lived in Galesburg fourteen years; that before that, they had

met Roberts at Canton, Illinois; that ever since they had been in Galesburg, Roberts had made his home at their place, having come there to board through their brother, who was a warm friend of Roberts, personally and in a business way; that whenever Roberts was away from Galesburg, he wrote to Della Mann, and generally said he was coming home; that from 1910 un- until his death he repeatedly said that he was going to build a modern home in Galesburg and was going to make Galesburg his home; that his last visit to Wichita was the latter part of December, 1914, and the fore part of January, 1915, and that on his return he told them that he was not going to Wichita any more on account of the treatment he had received there. This testimony came from Della Mann and her sister. They also testified that in the early part of 1915, a young lawyer in Galesburg was a candidate for an office; that Roberts said he was going to register and vote for him; that Roberts was absent from Galesburg on the first registration day and died before the second registration day. They testified that Roberts spent from half to three-fourths of his time in Galesburg. Della Mann filed a claim against the estate for board, room, washing and mending from March 7, 1910, to March 7, 1915, at $7 per week, less $210 paid thereon, and also for $50 money loaned, and for certain telephone tolls, in the total amount of $1,662.36. At one time Roberts had a stock of goods in Galesburg which he had taken on a trade and he signed a schedule of it for taxation in which he was described as "of the City of Galesburg, Knox county, Illinois." Roberts was taken very ill at the Mann home on March 9, 1915, and a physician was called who took him to a hospital and performed an operation upon him. The physician had never met Roberts before that morning. On the way to the hospital the doctor asked Roberts where he resided, and he answered, "in Galesburg, Illinois," and the doctor

asked him if he wanted any one to be notified if anything happened to him and he said: "Miss Mann," and that it was his home at the house from which he had just been taken and that he had made his home in Galesburg about fourteen years. On the day he died, according to the testimony of Miss Mann and her sister, he dictated a telegram to his wife about business matters for fear that some one else would have notified his wife of his illness and she might come on. The foregoing is the substance of the evidence on the subject of residence, and without discussing the degree of credence to be accorded to the various parts of the testimony, we think it sufficient to say that in our opinion the Circuit Court correctly decided that Roberts was a resident of Wichita, Kansas.

Appellant contends that if Roberts was a nonresident of this State, still a creditor is entitled to preference in administration over the public administrator. In *Rosenthal v. Prussing*, 108 Ill. 128, decided in 1883, it was held that a creditor of a nonresident intestate is entitled to preference over the public administrator. Section 18 of the Administration Act then in force (J. & A. ¶ 66) contained the following provision: "In all cases where the intestate is a nonresident, or without a widow, next of kin, or creditors in this State, but leaves property within the State, administration shall be granted to the public administrator of the proper county." The Supreme Court there held that while the literal reading of that sentence gave the preference to the public administrator, yet upon consideration of sections 46 and 48 of the Administration Act (J. & A. ¶¶ 95, 97) and certain sections of the earlier statute of "Wills," the word "or," in the part of the statute above quoted, should be read "and" and, so read, creditors were given the preference over the public administrator. In 1905, section 18 of the Administration Act was amended in several respects (J. & A. ¶ 66), and among other things the clause above quoted was

amended to read as follows: "In all cases where the intestate is a non-resident, and in all cases where there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, who at the time of the death of said decedent is a *bona fide* resident of this State, administration shall be granted to the public administrator." In *Krome v. Halbert,* 263 Ill. 172, where a resident heir at law of a nonresident deceased was contending with the public administrator for administration of property in this State, *Rosenthal v. Prussing, supra,* was approved as applied to that case, under this statute as amended. Undoubtedly the paragraph last above quoted does give the preference of administration to the next of kin over the public administrator, and *Rosenthal v. Prussing, supra,* is applicable to such a case. But the amendment has excluded the word "creditors" and therefore they are no longer preferred, and under section 18 as it now reads, in case of a nonresident intestate, the public administrator is preferred to all except the widow, husband and next of kin, resident in this State. Therefore the order of the court below was in accordance with the statute, and it is therefore affirmed.

Affirmed.

P. J. Millett, Defendant in Error, v. D. J. McDonald, Plaintiff in Error.

Gen. No. 6,211. (Not to be reported in full.)

Error to the Circuit Court of Kane county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by P. J. Millett, plaintiff, against D. J. McDonald, defendant, to recover on three lost promissory notes. From a judgment for plaintiff, defendant brings writ of error.

J. C. MURPHY and E. L. LYON, for plaintiff in error.

JOHN M. RAYMOND and JOHN K. NEWHALL, for defendant in error; ROBERT S. EGAN, of counsel.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. BILLS AND NOTES, 372*—*when variance exists between special count on note and proof.* There is a variance between a special count on a lost promissory note and the proof where such special count does not allege that the note is payable at any particular place, and proof deduced, on cross-examination of the plaintiff, that the note was payable at a specific place.

2. ASSUMPSIT, ACTION OF—*what is object of common counts.* The object of the common counts is to protect a plaintiff against some accidental variance.

3. ASSUMPSIT, ACTION OF, § 34*—*when recovery may be had on common counts on notes.* A recovery may be had on the common counts in an action on lost promissory notes, although there is some accidental variance in the description of the notes sued on

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

in the special count, where the existence of the notes is proven, the signature of the maker, the payment of the consideration and the loss of the notes before maturity.

4. INSTRUCTIONS, § 151*—*when requested instruction covered in charge properly refused.* A requested instruction covered in the general charge is properly refused.

5. PARTNERSHIP, § 52*—*when evidence insufficient to show formation of partnership.* In an action on three lost promissory notes alleged by defendant to have been advanced in a partnership transaction, evidence *held* insufficient to establish a partnership.

6. SET-OFF AND RECOUPMENT, § 40*—*when evidence insufficient to establish right of set-off.* In an action on lost promissory notes, evidence on behalf of defendant which was contradicted by plaintiff, *held* insufficient to establish a right of set-off.

7. EVIDENCE, § 134*—*when use of copies of letters without laying foundation on cross-examination improper.* It is improper to use carbon copies of letters from plaintiff to defendant for cross-examination of defendant after demand of the originals from the defendant and his failure to produce them, over objection, without first laying a proper foundation by showing that they are in fact true carbon copies of letters which were written and mailed by plaintiff to defendant, and introducing them in evidence.

8. APPEAL AND ERROR, § 1470*—*when use on cross-examination of copies of letters without laying foundation harmless error.* The use of carbon copies of letters from plaintiff to defendant upon cross-examination of defendant, after demand of the originals from the defendant and his failure to produce them, without laying proper foundation for their admission in evidence is harmless error where the necessary proof is afterwards made for their admission in evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Caroline Erickson, Appellee, v. Martin Svete et al., Appellants.

Gen. No. 6,215.

1. PLEADING, § 432*—*when averment laid under videlicet need not be exactly proved.* Where a date is laid under a *videlicet* in counts in a declaration, the plaintiff in an action under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss to her means of support because of the death of her husband from the use of intoxicating liquors sold by defendants, is not confined by such counts to proof of sales of liquor on such date.

2. INTOXICATING LIQUORS, § 228*—*when evidence sufficient to sustain finding that deceased died as a result of habitual intoxication.* In an action by a wife under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss to her means of support because of the death of her husband, alleged to be due to the use of intoxicating liquor sold by defendants to decedent, evidence *held* sufficient to sustain a finding that decedent died as a result of habitual intoxication.

3. INTOXICATING LIQUORS, § 229*—*when evidence sufficient to show loss to means of support of wife.* In an action by a wife under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss to her means of support because of the death of her husband from the use of intoxicating liquor sold by defendants, proof that the husband died from the use of intoxicating liquor, especially when accompanied by further proof that plaintiff was dependent upon decedent, *held* sufficient to show loss to her means of support.

4. INTOXICATING LIQUORS, § 181*—*when furnishing of money to husband to buy liquor no bar to right of recovery by wife for loss to her means of support.* The fact that a wife furnishes money to her husband with which to buy liquor does not bar her right of recovery for loss to her means of support due to his habitual intoxication and death from the use of such liquor, in an action under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609), but may be used in mitigation of damages.

5. APPEAL AND ERROR, § 1245*—*when party objecting to evidence may not complain that fact not proved.* Where a party prevents proof by his objection or procures its exclusion, he cannot object that a fact is not proved.

6. INTOXICATING LIQUORS, § 225*—*where evidence sufficient to show that wife not precluded from recovery of damages for loss to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

means of support. In an action by a wife under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609), to recover damages for loss to her means of support due to the habitual intoxication and death of her husband caused by the use of liquor furnished by defendants, evidence *held* sufficient to sustain a finding that plaintiff had done nothing which barred her from the recovery of damages.

7. INTOXICATING LIQUORS, § 246*—*when furnishing of money to husband with which to purchase, considered only in mitigation of damages.* The furnishing by a wife of money to her husband to buy liquor may be considered only in mitigation of damages, in an action for damages for loss to her means of support, under the Civil Damage Act, sec. 9 (J. & A. ¶ 4609).

Appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

MARTIN C. DECKER and GEORGE W. FIELD, for appellants.

R. J. DADY and A. V. SMITH, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On January 18, 1914, Peter Erickson died. On September 10, 1914, his widow, Caroline Erickson, began this suit against certain saloon keepers under section 9 of the Dramshop Act (J. & A. ¶ 4609). By additional summons and amended declaration this became a suit against Martin Svete and Frances Svete, his wife, and John Walente and Rosalie Walente, his wife. The men were saloon keepers, and it was alleged that each wife owned the building where her husband's saloon was conducted and knew of and assented to its use for that purpose. It turned out during the trial that during the period in question Mrs. Svete did own the building wherein her husband conducted a saloon and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

that Mrs. Walente did not own the building in which her husband conducted a saloon. Thereupon the suit was dismissed as to Mrs. Walente. The first and second counts of the declaration charge that the defendants Svete and Walente sold intoxicating liquor to Erickson on January 18, 1914, and thereby produced his intoxication and caused his death, and it is argued that under these counts there could only be proof of sales of liquor on that day. The record shows, though the abstract does not, that said date was laid under a *videlicet* and therefore appellee was not confined by those counts to proof of sales on that particular date. *Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434. The third and fourth counts charged that the defendants gave and sold intoxicating liquor to Erickson during the period of nearly five years preceding his death and thereby caused him to become habitually intoxicated, and that he thereby wasted and squandered his property and became greatly impoverished and degraded in mind and body, and in consequence of said habitual intoxication came to his death. The jury returned a verdict finding the defendants guilty and assessing plaintiff's actual damages at $1,500 and her exemplary damages at $500, and assessing $750 against Walente, $750 against Svete and $500 against Frances Svete. The court thereupon in writing instructed the jury that they could not find a verdict in several amounts against different defendants, but that their verdict, if any, should be for a lump sum against all defendants found guilty, and they then retired and returned a verdict assessing appellee's damages at $2,000. On a motion for a new trial, at the suggestion of the court, appellee entered a remittitur of $500. Motions for a new trial and in arrest of judgment were denied, and there was a judgment against defendants for $1,500 and costs. Svete and wife prosecute this appeal therefrom, and contend that the evidence shows that Erickson did not die as a result of intoxication; that there is no proof

that appellee was injured in person or property or means of support in consequence of the intoxication of her husband; and that appellee procured and furnished liquor to her husband and the doctrine of contributory negligence precludes a recovery by her.

Deceased was fifty-two years old at his death and his wife was sixty-four or sixty-five years old. He was a wire drawer in a wire mill and worked nights. When they were first married he did not drink at all. He then drank slightly and moderately. For the last five years of his life he drank very heavily. He was accustomed to come home in the morning with a pail of beer and a bottle of whisky, which he consumed, and frequently got a second allowance during the day. He was often drunk, especially Saturday nights and Sundays. Sometimes he was sent home by the man over him because he was so drunk that he was unfit to work. Sometimes he was required to lay off for a week in order to sober up. The physicians who made a post mortem found his heart, kidneys, liver and spleen very much enlarged. They testified that he died of chronic alcoholism. On the day of his death he came home at four o'clock in the morning, complaining that he was ill, and slept until seven o'clock and then went out and got beer and whisky and drank it, slept a while longer, went and got liquor again and drank it, and died in bed at one o'clock in the afternoon. Walente testified that Erickson had only drank in his saloon three or four times, and the last time was more than six months before he died. There were numerous witnesses who swore to seeing Erickson get liquor in that saloon at various times, and several of the witnesses testified to seeing him drinking liquor there the month before he died. Svete and wife testified that he had obtained liquor in their saloon almost daily for the preceding five years and often more than once a day. The jury could not have found otherwise than that he died as a result of habitual intoxication and chronic alcoholism.

Betting v. Hobbett, 142 Ill. 72, and cases there cited, show that the jury are authorized to infer loss to plaintiff's means of support from proof of the husband's death alone. Moreover, appellee here proved her husband's employment and wages and that a certain portion thereof he gave to her with which to run the household. She was an old woman and obviously dependent upon her husband for support.

Several witnesses testified that appellee on various occasions had come to the saloon and obtained beer or whisky for her husband and taken it home to him. She denied this, but admitted that she had given him money out of his earnings with which to buy beer and whisky, and she undertook to tell that she did it because she was afraid of her life; that he had threatened to kill and would kill her if she did not comply, and she sought to prove by others that he was extremely ugly to his wife when she sought to interfere with his drinking. The court sustained objections by appellants to most of this class of testimony and excluded a part of it, and yet instructed the jury at the request of appellants that though the evidence established the case charged by appellee, yet if they found from the evidence that appellee procured and furnished intoxicating liquor to her husband, which materially assisted to form his habit of intoxication or to keep up his habit of intoxication, then she could not recover, unless the jury believed that she procured and furnished such liquor for her husband while she stood in fear of receiving physical injury from him if she refused to do so. There is some evidence still left in the record that deceased was a man of violent temper, and that appellee was governed by fear of him in whatever she may have done in the way of bringing liquor to the house during the last five years of his life. But, where a party prevents proof by his objection, or procures its exclusion, he cannot object that such a fact is not

proved. *Hahl v. Brooks*, 213 Ill. 134; *Hepler v. People*, 226 Ill. 275; *Owen v. Crumbaugh*, 228 Ill. 380. Therefore, this case must be treated as if appellee made the proof which she sought to make, if said instruction stated the law correctly. But we understand the law in this State to be that, in such a case, conduct of the wife sanctioning the use of liquor by her husband does not bar her from a suit against those who have sold him liquor and procured his habitual intoxication and death, and loss thereby to her means of support, but may be used in mitigation of damages. *Hackett v. Smelsley*, 77 Ill. 109; *Earp v. Lilly*, 217 Ill. 582; *Leverenz v. Stevens*, 124 Ill. App. 401. Appellee testified that she went to Svete and Walente and requested them not to sell liquor to her husband and that they each promised not to do it. They testified that she told them that when he had the money she was willing they should sell him the liquor. She denied this and testified that what she said was that when he went into a saloon and ordered liquor and had the money to pay for it, she could not prevent it. We are of opinion that the jury were warranted in finding that appellee had done nothing which barred her from recovering damages.

As the judgment should not be reversed for any cause set up in appellant's brief, it is therefore affirmed, and the cost of the additional abstract will be taxed against appellants.

Judgment affirmed.

Jewel Tea Company, Appellee, v. A. T. Petersen, Appellant.

Gen. No. 6,220. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Bill by Jewel Tea Company, complainant, to enjoin A. T. Petersen, defendant, from entering into the same business as that of complainant in violation of a contract of employment. From an order granting a temporary injunction, defendant appeals.

JOHN B. KING and LEO G. HANA, for appellant.

KIRK & SHURTLEFF, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 159*—*when order for issuance of temporary injunction valid.* The fact that a prayer for a temporary injunction is in a paragraph preceding the prayer for a summons instead of in such latter paragraph does not render an order for the issue of a temporary injunction invalid.

2. INJUNCTION, § 385*—*when order requiring injunction bond with security approved by clerk harmless error.* The fact that an order for a temporary injunction provides for an injunction bond with security to be approved by the clerk of the court instead of by the court, as is required by statute, does not constitute reversible error, as the obligors cannot escape liability on such ground.

3. INJUNCTION—*when temporary injunction properly granted on answer.* On a bill for a temporary injunction to restrain defendant from engaging in the same business as complainant in violation of an employment contract, *held* that an injunction was properly

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

granted after answer filed, where a copy of the contract was attached to the bill and defendant did not deny that it was a true copy, and admitted the making of the contract, that it was terminated, and that he had gone into the same business and sought to trade with customers of the company, all of which was in violation of the contract.

4. CONTRACTS, § 285*—*what does not constitute abandonment of contract not to engage in same business.* Where a contract of employment with a grocery company selling direct to consumers by wagons provides that the servant is employed not only to take orders for and deliver teas, etc., but also "to perform such other duties as the party of the first part may from time to time specify and require of him," the fact that the duties of the servant are changed during the term of employment from that of wagon man and route agent to office duties in a branch office does not constitute an abandonment of other terms of the contract not to engage in the same business for a certain period.

5. INJUNCTION, § 159*—*when bill to enjoin defendant from engaging in same business in violation of contract does not allege rescission of contract.* On a bill for a temporary injunction to restrain defendant from engaging in the same business as complainant in violation of a written contract of employment, allegations in the bill that on a certain date, in consideration of a certain sum paid by complainant to defendant and accepted by him as payment for one week's salary in advance, the contract of employment was then terminated by mutual agreement, when construed with other allegations in the bill, *held* to mean that defendant's employment was mutually terminated and that the written contract was not abrogated.

6. ESTOPPEL, § 47*—*when employer not estopped to assert equitable rights by injunction against employee engaging in same business in violation of contract.* An employer is not precluded from asserting equitable rights by injunction under a written contract of employment, whereby the employee agrees not to engage in the same business during or upon termination of the employment, by neglecting to pay to the employee an additional month's pay upon discharge as provided by the contract, where the employee did not ask for such additional pay.

7. INJUNCTION, § 80*—*when temporary injunction proper to prevent violation of contract not to engage in same business.* A temporary injunction lies to prevent a former employee of a grocery company from engaging in the same business in violation of the terms of his contract of employment, where the damages which such violation will inflict upon the company are practically impossible of ascertainment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Margaret E. Hindle by Charles N. Hindle, Appellee, v. City of Joliet, Appellant. John W. D'Arcy, Appellee.

Gen. No. 6,154.

1. MUNICIPAL CORPORATIONS, § 1107*—*when existence of visible crack in top of slab of stone constituting part of sidewalk before accident question for jury.* In an action against a city for damages for personal injuries caused by the breaking of a large slab of limestone in a sidewalk over a coal basement, *held*, under conflicting evidence, that it was a question for the jury whether a visible crack existed in the top of the slab a few days before the accident.

2. MUNICIPAL CORPORATIONS, § 1023*—*when charged with notice of probable latent defects in sidewalk.* A city which uses limestone quarried in the locality of a character known to frequently have curly and blind seams, which cannot be detected until they come to the surface, is charged with notice that concealed curly seams are likely to exist in such limestone and that if such a seam was in a stone it would probably result in the breaking of the stone.

3. MUNICIPAL CORPORATIONS, § 1107*—*when question of exercise of ordinary care in supporting stone used in sidewalk for jury.* Where a city used a limestone rock which was over eight feet long, six feet wide and seven or eight inches thick, unsupported, except at the edges, in a sidewalk over a coal cellar, and a manhole one foot in diameter was placed in such stone, and the stone was of a character known to frequently have concealed curly seams which would cause the breaking thereof when they came to the surface, and there was a great amount of public travel over such sidewalk and another similar stone had been found broken in the same walk shortly before the accident, *held* that it was a question for the jury in an action for damages for personal injuries to a pedestrian who was precipitated into the cellar because of the sudden breaking of the stone whether the city was in the exercise of ordinary care in permitting the stone to rest with such a support.

4. MUNICIPAL CORPORATIONS, § 994*—*what degree of care required of as to condition of sidewalks.* A city must use reasonable care to keep its sidewalks in a reasonably safe condition.

5. NEGLIGENCE, § 191*—*when question of law.* Negligence is a question of law only when the facts are so clear as to lead to but one reasonable conclusion.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

6. NEGLIGENCE, § 198*—*when ordinary care question of law.* Ordinary care is not a question of law unless the facts will lead to but one reasonable conclusion.

7. MUNICIPAL CORPORATIONS, § 1006*—*how sidewalks may be constructed.* Municipalities may construct their sidewalks with as many different kinds of materials and in as many different ways as they please without interference by the courts provided they keep them reasonably safe.

8. APPEAL AND ERROR, § 1410*—*when verdict not disturbed as unsupported by evidence.* A verdict will not be disturbed as being unsupported by the evidence unless it is against the manifest weight of evidence.

9. MUNICIPAL CORPORATIONS, § 1087*—*when evidence as to nature of material and manner of construction of walk admissible in action for personal injuries resulting from defects.* In an action against a city for damages for personal injuries to a pedestrian who was precipitated into a coal cellar under a sidewalk as the result of the breaking of a large unsupported limestone rock over such cellar, *held* that evidence that rock of such a character was known to have latent defects or seams, and that there was no center wall or support under the stone, was admissible.

10. MUNICIPAL CORPORATIONS, § 1100*—*when refusal of requested instruction that failure to place support under sidewalk not negligence, proper.* In an action against a city by a pedestrian for damages for personal injuries sustained as a result of being precipitated in a coal cellar under a sidewalk, as the result of the breaking of a large unsupported stone in the walk over such cellar, a requested instruction that the failure to have a center wall or support under the stone was not of itself negligence, *held* correctly refused.

11. MUNICIPAL CORPORATIONS, § 993*—*how stone in walk must be supported.* A stone constituting a part of a walk may be supported in any manner provided it is reasonably safe.

12. INSTRUCTIONS, § 151*—*when requested instructions covered by given instructions properly refused.* Requested instructions which are fully covered by given instructions are properly refused.

Appeal from the Circuit Court of Will county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. *Certiorari* denied by Supreme Court (making opinion final).

EDWARD R. NADELHOFFER, for appellant.

SNAPP, HEISE & SNAPP, for appellee Margaret E. Hindle.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE CARNES delivered the opinion of the court.

Margaret E. Hindle, a girl about fifteen years old, was on the sidewalk on the south side of Van Buren street in the business portion of the City of Joliet on the evening of May 28, 1912, when a large flagstone broke under her and she fell into an area way about seven feet deep. She was seriously and permanently injured. This action was brought against the City of Joliet and one D'Arcy, the owner of the adjacent premises, to recover for that injury. A jury found a verdict against the city for $6,000 upon which judgment was entered. The city prosecutes this appeal.

The plaintiff was rightfully at the place and in the exercise of ordinary care. It is not claimed that the verdict is excessive. Appellant's main contention is that the defect in the stone was hidden and latent and could not have been discovered in the exercise of ordinary care.

It appears without controversy, that the sidewalk at and near that place was constructed of slabs of Joliet limestone laid side by side. The stone which broke was eight feet seven inches long, six feet wide, and seven or eight inches thick, and had been in that place about thirty-five years. The upper surface was worn smooth by travel. There was a manhole in the stone about one foot in diameter covered by an iron plate. The stone extended from the curb to within about four feet of the building, and was supported only by a stone wall fifteen inches thick on the street side and a brick wall twelve inches thick on the building side. The area way under the stone could be reached from the basement under the building, and until a short time before the accident by an outside stairway. It was used for storing coal. The line of break in the stone ran directly through the manhole and was in the half of the flagstone adjacent to the street. It was Joliet limestone quarried in and about that city where it existed in

layers of different thicknesses. It is a well-known defect in that kind of limestone that it has "seams" which are usually vertical. One kind known as curly seams and blind seams meaning that they zigzag through the stone and there are no means of detecting them unless they come to the surface. Seams do not exist in all Joliet limestone, but they are quite likely to be found in it. An experienced witness said: "There are seams in Joliet limestone that cannot be readily seen. * * * It is pretty hard to get acquainted with Joliet limestone in regard to seams. You don't know when they are coming. I never got acquainted with them yet. In my experience I have discovered quite a number of them. You cannot always see them." The effect is to weaken the stone and it eventually breaks because not strong enough to hold under a strain.

This stone had a curly seam which could not be detected from the upper surface. It extended the full length of the stone and from the bottom to a quarter of an inch or less from the top. It broke and separated along that seam. It could perhaps have been detected by a careful examination from the under side, but probably would not have been seen in any ordinary inspection. Employees of the city inspected this walk a few weeks before the accident; took off all the manhole covers and examined the stone around the manhole, but did not go under the walk. They discovered no defect but they were not especially looking for that kind of a defect. D'Arcy, the owner of the building, examined the walk shortly before the accident, discovering no defect in this stone. There was at that time a similar stone near by in the walk which was broken. There was no area way under it and it could not fall. It was repaired. Two witnesses for appellee testified that several days before the accident they noticed a crack in the stone which afterwards broke and occasioned the injury. They describe the crack corresponding to the break in question and say it was a crack that

could then readily be seen and that the stone had a rocking motion under the feet. It is stoutly contended by appellant that these witnesses are mistaken; that it was the other broken stone near by that they were speaking about. The city introduced witnesses who testified that there was no visible crack in the top of this stone before it finally broke, witnesses who were in a position to know if there had been one. It left a fair question for the jury whether there had been a visible crack in the stone several days before the accident. There is no question that the city was charged with notice that concealed curly seams were likely to exist in a slab of Joliet limestone of this kind and character, and if such a seam was there it would probably sometime result in the breaking of the stone, as happened in this case. It was also charged with notice that the stone extended over this area way with no support except at the sides; also that a similar stone near by had broken. If the plaintiff's two witnesses above mentioned are to be believed, there had been an open visible crack in the stone long enough so that the city was charged with notice of that, which would leave no question as to its liability. If they are not to be believed, it was a question for the jury whether, considering the known character of the stone, the great amount of public travel at that place and that a similar stone in the same walk had lately broken, the city was in the exercise of ordinary care in permitting that stone to rest with that support, in that place, with the liability that it might break and occasion great loss and injury. It is not so much a question whether it should have discovered the seam as whether it should have guarded against the danger of an undiscoverable defect that it had notice might exist.

There is little ground for controversy about the law governing these facts. Appellant cites many authorities to the effect that a city is only bound to exercise reasonable care to keep the sidewalk in a reasonably

safe condition; that it is not an insurer against accidents or bound under the law to keep its sidewalks absolutely safe or absolutely perfect; that it is not liable for latent and unseen defects in its sidewalks not discoverable by the exercise of ordinary care; that it is only bound to remedy defects that can be detected by the exercise of ordinary care, and only bound to use reasonable care to see that its sidewalks are in a reasonably safe condition; that it must have either actual or constructive notice of a defect in a sidewalk before it may become liable. These are long established propositions of law and mean little, if anything, more than that the city must use reasonable care to keep its walks in a reasonably safe condition, and nothing more is required of it. Counsel cite numerous cases where certain acts or omissions have been held by the courts to amount to due care or negligence on the part of a city. Such cases show what different courts in passing upon the facts have held as a matter of fact, not as matter of law, constitute due care or negligence. Ordinary care and negligence are not questions of law unless the facts are so clear as to lead to but one reasonable conclusion. A given method of construction, maintenance and inspection of walks might be ordinary care under one condition and negligence under another. A walk might be so built that little inspection would be required, and another walk so built and located that constant inspection would be called for in the exercise of ordinary care. Appellant's counsel well say the jury has no right to review the discretion of the city authorities in adopting a plan of construction of sidewalks. It is also true that the courts have no such power. Municipalities may construct their sidewalks with many different kinds of material and in many different ways free from interference by courts or juries provided they keep them reasonably safe. But whatever the material or method of construction the city is bound to exercise reasonable care in view of the con-

struction to keep the walk in repair. It must exercise reasonable diligence to ascertain and guard against the varying defects and dangers incident to each kind of construction, or, failing to do so, it will become liable for injuries resulting. Whether in this case the city was guilty of negligence was a question of fact for the determination of the jury subject to the control of the trial court and reversal in this court if, in our opinion, the conclusion of the jury was manifestly against the weight of the evidence. We are not of the opinion that the verdict was manifestly against the weight of the evidence, therefore we are not warranted in disturbing it.

Appellant argues that the court erred in allowing evidence to go to the jury that Joliet limestone flags may have latent defects, or seams, and in allowing evidence that there was no center wall or support under the stone, and in refusing an instruction that the failure to have such center wall or support was not of itself negligence. We find no error in these respects. It was necessary for the jury to know of what and in what manner the walk was constructed, and to know, either from common knowledge or from evidence of experienced witnesses, the nature of the material of which it was built. The instruction was properly refused because it was not for the court to inform the jury as matter of law what method of construction or maintenance was or was not negligence. There can be no law that says in what manner a stone in a walk shall be supported further than to say it must be reasonably safe. Complaint is also made of the refusal of other instructions offered by appellant, but in so far as they were material they were fully covered by given instructions. The principles of law controlling this case are elementary. The jury were fully and fairly instructed thereon.

We find no error in the record, therefore the judgment is affirmed.

Affirmed.

Chicago Great Western Railroad Company, Appellant, v. American McKenna Process Company, Appellee.

Gen. No. 6,161.

1. LIENS, § 8*—*when lien for labor on chattels waived.* A laborer waives his right to a lien on chattels by giving time beyond the date of delivery for payment.

2. CONTRACTS, § 331*—*when stipulation for credit waived.* A stipulation in a contract for thirty days' credit after shipment of personal property upon which labor is to be performed is waived where the laborer requests payment without shipment and the owner complies with such request.

3. CONTRACTS, § 263*—*when party may not rescind contract in part.* A party in order to obtain the benefit of a provision of a contract favorable to him must conform to other provisions not in his favor.

4. CONTRACTS, § 253*—*what is effect of modification of in part.* A contract may be varied as to one of its provisions without affecting the liability of the parties under its other terms and conditions, unless such conditions are directly related to the modified condition, in which case the related conditions are also modified.

5. ASSUMPSIT, ACTION OF, § 70*—*when recovery may be had under common counts for labor performed.* Where a contract for labor is substantially varied by subsequent agreement as to require more time and greater expenditure on the part of the plaintiff to complete the performance of it, he is not obliged to sue on the original contract but may recover on the common counts.

6. ASSUMPSIT, ACTION OF, § 70*—*what is extent of recovery for labor in action on quantum meruit.* Where work is done under a special contract, the price must be governed by the stipulations of the contract, even when the plaintiff is justified in abandoning the contract and bringing his action for *quantum meruit.*

7. CONTRACTS, § 187*—*what is effect of construction by parties in determining rescission or abandonment of.* The construction placed upon the provisions of a contract by the parties is of great weight and often controlling in cases of doubt whether such changes and noncompliance exist as to permit a party to treat the contract, or a provision of it, as rescinded or abandoned.

8. LIENS, § 2*—*when lien for labor on chattel exists.* As a general rule a lien for labor on a chattel exists only when the laborer enhances the value.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

9. APPEAL AND ERROR § 1679*—*when variance waived.* A variance between allegations and proof is waived if not suggested in the trial court.

10. APPEAL AND ERROR, § 1466*—*when admission of evidence as to value of services harmless error.* The admission of evidence of the plaintiff as to the reasonable value of services in rehandling rails in an action to recover for such services, when there was no proof as to the market value of the labor, *held* to be harmless error where no motion was made to exclude the evidence and no effort was made to show that the charge was excessive or unreasonable.

11. APPEAL AND ERROR, § 1470*—*when proof of contents of letter without proof of its loss harmless error.* Proof of the contents of a letter without proof of its loss is harmless error where such evidence adds nothing material to what is already in the case.

12. TRIAL, § 130*—*when remarks of counsel improper.* It is improper for counsel for the plaintiff in action against a railroad company to call the defendant the "black sheep" of the railroad business in his address to the jury.

13. APPEAL AND ERROR, § 1514*—*when improper conduct of counsel in addressing jury harmless error.* In an action against a railroad company, the action of the attorney for the plaintiff in calling the defendant the "black sheep" of the railroad business, *held* not reversible error under the condition of the record.

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. *Certiorari* denied by Supreme Court (making opinion final).

J. L. O'DONNELL, T. F. DONOVAN and J. A. BRAY, for appellant; WINSTON, PAYNE, STRAWN & SHAW, of counsel.

SNAPP, HEISE & SNAPP, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

The appellant, Chicago Great Western Railroad Company, brought this action of replevin for about 122 tons on its rails in the possession of the appellee, American McKenna Process Company, which held them on claims of liens for labor. A jury trial resulted in a judgment in the alternative, as provided in section

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

22 of our Replevin Act (J. & A. ¶ 9207), that the plaintiff pay the amount claimed or make return of the property, from which judgment this appeal is prosecuted.

There is practically no controversy about the evidentiary facts. There was a written contract of July 13, 1911, that appellee should re-roll at its Joliet plant 5,000 tons of appellant's rails, approximately 3,000 tons to be delivered immediately and work begun at once, the balance to be delivered not later than June 1, 1912. The price was fixed at $5 per ton if appellant delivered the full amount of 5,000 tons, or $6 per ton if a less amount was delivered within the time named, payment to be made within thirty days from the date of shipment of finished rails by appellee. It is a fair construction of the contract that appellant should receive the rails from time to time as they were finished in the ordinary course of business. Appellant commenced to forward rails in August, and before December 11, 1911, had shipped about 2,700 tons, which were received by appellee, sorted out into various grades prepared for re-rolling, and piled in its yard. For various reasons appellant did not wish the work done at the time contemplated by the contract, and on December 23, 1911, a supplemental contract was, at the instance of appellant, executed providing that these rails in the yard of appellee might remain there the property of appellant until they should be re-rolled and reshipped. Appellant forwarded no more rails, and from time to time answered appellee's urgent insistence that it be permitted to go on with the work with the request that it be deferred because it, appellant, was not in condition to receive and use the rails. Finally on July 29, 1912, appellee commenced re-rolling the rails and continued until about August 5, 1912, finishing in that time about 1,245 tons, which were inspected and passed by an agent of appellant, and eleven cars loaded for ship-

ment, when appellant notified appellee that it would not then receive the rails and they were consequently unloaded and again stored in appellee's yard. No more rails were re-rolled. What remained of the 2,700 tons was shipped out on appellant's order and fifty cents a ton charged and paid for handling them. Appellant sold the finished rails to the Pere Marquette Railroad Company, and this sale made necessary another inspection by parties representing that company, which required much manual labor in handling the rails, and that labor was furnished by appellee at the request of appellant. Under the second inspection the rails were divided into different grades and some changes made by way of shortening some of the rails, and taking twists out of others. In November, 1912, while the finished rails were still in the yard, appellee requested payment at $6 a ton on an estimated amount of the finished rails, which appellant paid, and at the same time appellee shipped to the order of appellant all the finished rails except about 122 tons, which still remained in its yard. September 6, 1913, appellee sent appellant a bill based on the actual weight of the finished rails, showing a balance due for re-rolling of $526.02, about which there is no controversy, and also included in the bill a charge of fifty cents a ton ($666.33) for extra handling required by said second inspection. Appellant objected to the charge for extra handling, and paid no part of the bill, but after demand and refusal to deliver, took the rails on the writ of replevin issued in this case. A declaration was filed in the usual form, and appellee's defense rests on two special pleas in each claiming a lien, one setting up the charge of $526.02 for re-rolling, and the other a charge of $1 a ton ($1,332.67) for extra handling.

The controlling question is whether appellee was entitled to hold the rails until its charge for labor was paid. It is claimed that because of the provision in the

original contract for thirty days' credit after shipment by appellee, no right of lien could exist, and many authorities are cited to the effect that a laborer waives his right of lien by giving time beyond the date of delivery for payment. This is no doubt the law. *Stevens v. Faucet,* 24 Ill. 483; 25 Cyc. 674. It is also obvious that if appellee was under an obligation to deliver these rails on demand and wait thirty days for payment, it could not ground a defense in a replevin suit on the fact that payment before delivery was refused. It is claimed by appellee that the stipulation in the original contract of July 13, 1911, for thirty days' credit was waived by appellant and was not binding on appellee at the time of its refusal to deliver the rails. Appellee bases this contention on the consideration that the contract containing this stipulation provided for immediate delivery after July 13, 1911, of 3,000 tons of rails by appellant, which were to be immediately re-rolled and reshipped to appellant in the ordinary course of business, and paid for by appellant in thirty days after shipment; that appellant did not perform this essential part of its contract, but shipped 2,700 tons and asked for and obtained a written modification of the contract as to the time within which the work should be done, under which modification appellee was to do the work within a reasonable time, but that appellee from time to time deferred the work at the urgent insistence of appellant, leaving the rails stored in its yard and subjecting itself to much trouble and inconvenience in so doing, which was repeatedly stated to appellant and well understood by it; that finally long after these rails would have been re-rolled and reshipped and paid for if the original contract had been complied with, appellee, while the rails were still in its yard, requested payment based on an estimate which covered nearly all of its charge for re-rolling. By this request for payment without shipment, appellee treated the stipulation for credit as no longer in

force, and appellant, by complying with this request, acquiesced in that construction. We think this position of appellee well taken. A party in order to obtain the benefit of a provision of a contract advantageous to him must conform to other provisions not in his favor. *Babcock v. Farwell,* 245 Ill. 39; *Graham v. Holloway,* 44 Ill. 385; *Harrison v. Polar Star Lodge,* 116 Ill. 279; *Hale v. Bryant,* 109 Ill. 34; *Lasher v. Loeffler,* 190 Ill. 150; *Mount v. Williams,* 11 Wend. (N. Y.) 77. A contract may be modified as to one of its provisions without affecting the liability of the parties under its other terms and conditions, unless such conditions are directly related to the modified condition, in which event the related conditions must be held also modified. (35 Cyc. 127.) Where a contract is varied by subsequent agreement so as to require more time and greater expenditure on the part of a plaintiff to complete the performance of it, he is not obliged to sue on the original contract but may recover on the common counts. 9 Cyc. 690; *Huehl v. Monarch Refrigerating Co.,* 157 Ill. App. 145; *Anglo-Wyoming Oil Fields v. Miller,* 117 Ill. App. 552. But where the work is done under a special contract, as in this case, the price must be governed by the stipulations of that contract, even when the plaintiff is justified in abandoning the contract and bringing his action for the *quantum meruit. W. H. Purcell Co. v. Sage,* 200 Ill. 342; *Rice v. Partello,* 88 Ill. App. 52, and Illinois cases there cited. We assume that the above mentioned rules governing the right of a party to a contract to treat it as rescinded or abandoned must be applied only where there have been substantial changes in the contract, or substantial noncompliance by the other party, but in cases of doubt whether such changes and noncompliance exist as to permit a party to treat the contract or a provision of it, rescinded or abandoned, then, as in all cases of interpretation of doubtful contracts, the construction placed

on its provisions by the parties to the contract is of great aid and often controlling. *W. H. Purcell Co. v. Sage, supra.* We are of the opinion that the changes in the original contract made at the instance of appellant and for its advantage, and against the constant contention of appellee and to its disadvantage, justified appellee in at least asserting that the stipulation for credit was abandoned because of its relation to the other provisions that had been abandoned. It was certainly equitable that it should be so treated, and when appellant acquiesced in this assertion by paying what was estimated to be the amount of the bill for re-rolling before the rails were delivered, it should not be permitted to set up that same provision for credit to defeat a recovery in this action for the little balance that was found on actual weight of the rails not covered by the estimate. Under this view of the case the verdict and judgment were properly for appellee under its special plea of lien for the payment of $526.02 due for re-rolling. But the verdict also allowed the amount of $1,332.67 claimed for rehandling, and the judgment covered that amount. Appellant argues that judgment on this plea is bad because the rehandling did not enhance the value of the rails, and a lien only exists where the work of a laborer enhances value. This is true as a rule, but in applying it, "value" does not always mean market value. If an owner of property employs a mechanic to change its character to satisfy some special use or even whim of the owner, the mechanic is not deprived of his right of lien because the article may have less market value after it is finished than it had before. But it is not necessary to much consider this rule of law here. The evidence shows that by the work done as a part of the second inspection, resorting the rails, straightening some of them and shortening some of them, their market value was increased. But it is argued that the plea counted on storing, handling and care of the rails, and that the

added value from straightening and shortening some of the rails comes under none of those designations, therefore that there was a variance between the allegations and the proof. And while it is admitted that this evidence was not objected to and the variance was not pointed out in the trial below, it is claimed to be so substantial a departure from the pleadings as to be fatal. We do not think this position well taken. If the work proven was not technically covered by the change "handling" (and we do not say it was not), the variance could have been easily remedied by amendment had it been suggested on the trial, and the familiar rule that a variance is waived if not suggested in the trial court should be applied. Appellant also urges that there is no competent evidence that the services of appellee in rehandling the rails were reasonably worth $1 a ton, and no proof as to the market value of such labor, and calls our attention to the fact that in the bill originally rendered only fifty cents a ton was charged for the service. The proof on this subject was not contradicted, but was to the effect that the cost of rehandling—of the extra work—was not less than $1 a ton, and was probably over $1 a ton, and while in a letter accompanying appellee's bill for fifty cents a ton it said it was a usual charge, it appeared on the trial that appellee had done none of this kind of work before; that there was no usual charge, and from the nature of the work, it is quite apparent that there could be no very customary charge anywhere for that kind of labor. There was no motion made to exclude this evidence, and no effort to show that the charge was excessive or unreasonable. We think, under this condition of the record, the admission of this proof and the use of it by the jury as a foundation of their verdict should not be held reversible error. *Schmitt v. Kurrus,* 234 Ill. 578. It was held in *Travis v. Pierson,* 43 Ill. App. 579, that in the absence of anything indicating bad faith what one had actually paid for service is ad-

missible in evidence to show what the reasonable cost of such service is, and while the rule as there announced may not be one of general application and may not warrant the retention of such testimony on motion to exclude it, still we think in the absence of such motion that it should not be allowed to work reversible error in a case where it is quite clear that the services were reasonably worth the amount claimed.

It is urged that the court erred in permitting evidence of the contents of a letter to go to the jury without proper proof of the loss of the letter. It was a note handed an agent of appellee by an agent of appellant directing appellee to permit the second inspection of the rails above mentioned. It is not material here whether the court technically erred or not in permitting the proof of the contents of the note. There had been oral proof introduced that appellant had authorized such inspection, and among the stipulated facts read to the jury it is recited that: "In compliance with said request of the railroad company, the process company rehandled the said rails for the purpose of inspection." Proof of the contents of the letter in question in no way added or subtracted from anything material otherwise in the case. Appellant also argues several objections to the instructions given at the instance of appellee. If we are right in our conclusions of law before expressed, there is no substantial error in the instructions. On the plea claiming a lien for balance due for re-rolling the rails, the defendant was entitled to a directed verdict. On the other plea claiming a lien for services in rehandling, if the evidence as to the value of those services is as matter of law a competent basis for a finding of the jury, their verdict was right as to the whole amount. There is no evidence in the record upon which they could intelligently base a different finding. Objection is also urged to a remark of appellee's counsel in his address to the jury in

which he characterized appellant as the black sheep of the railroad business. Objection was made to that remark and the court overruled the objection. We think the remark improper, and the ruling of the court error, but in the condition of the record as just pointed out, we see no reason for holding it reversible error. Finding no reversible error in the record the judgment is affirmed.

Affirmed.

American Steel & Copper Plate Company, Appellee, v. H. H. Bilter et al., Appellants.

Gen. No. 6,162. (Not to be reported in full.)

Appeal from the Circuit Court of Du Page county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Bill in aid of execution by American Steel and Copper Plate Company, complainant, against H. H. Bilter and others, defendants. From a decree setting aside a conveyance by defendant and subjecting the property to the lien and payment of the judgment and execution, defendants appeal.

On May 23, 1913, H. H. Bilter, his wife and two sons, Raymond R. Bilter and H. C. Bilter, the four defendants, were living as one family in a residence owned by H. H. Bilter in Elmhurst, DuPage county, Illinois. He also owned a farm of about 293 acres in the same county, and was indebted to parties other than complainant in amounts aggregating $24,550. On that date summons was served upon him in a common-law

suit by the plaintiff, American Steel & Copper Plate Company. Four days thereafter for an expressed consideration of $1 he conveyed, his wife joining with him, all said real estate to said two sons by deed that was duly recorded. The common-law suit brought by complainant terminated October 18, 1913, in a judgment against him of $442.31. Execution issued therein, and he filed a schedule of his personal property showing a valuation of less than his exemptions of $400. The execution was levied on all the real estate so conveyed and complainant filed its bill in equity in this case in aid of the execution. Issues were joined, the cause referred to the master in chancery who reported the evidence with his conclusion that the prayer of the bill be granted. Objections and exceptions to the master's report were filed and overruled, and a decree entered setting aside the conveyance and subjecting the property to the lien and payment of the judgment and execution, from which decree this appeal was prosecuted.

The evidence showed that the real consideration for the conveyance was an agreement in writing by the grantees to assume and pay the before mentioned indebtedness of their father to parties other than plaintiff; and that the grantees understood that the transfer covered all the real estate and personal property of their father. Evidence was introduced by plaintiff as to the market value of the real estate, from which the master found that at the time of the transfer the fair cash value of the residence in Elmhurst was $6,000 and of the farm $45,415, making an aggregate of $51,415. No evidence to the contrary was introduced except that it was shown, subject to objection, that the assessed valuation of the property for purposes of general taxation was less than the amount agreed by the grantees to be paid for it, and the grantees testified that at the time of the transfer they arrived at the value of the property by a computation as to its net revenue, and the result was about the amount they agreed to pay for

it. The property had a market value. The master concluded that the amount agreed to be paid by the grantees was about forty-five per cent. of the value of the property.

The grantees testified they did not, at the time of the transfer, know of their father's indebtedness to plaintiff, and there was no direct evidence that they did then know of it. The parties continued to live together under an arrangement, they said, that the father should work for the grantees for his board.

FRED A. DOLPH, WILLIAM H. GALLAGHER and S. L. RATHJE, for appellants.

CHARLES S. WILLISTON, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 63*—*when evidence as to assessed valuation of property immaterial in determining value.* Where property has a market value, evidence as to its assessed valuation is incompetent and immaterial.

2. EVIDENCE, § 63*—*when market value may not be determined on basis of revenue.* The market value of property may not be determined by computation of what it would be worth on the basis of revenue.

3. FRAUDULENT CONVEYANCES, § 268*—*when evidence sufficient to show conveyance for insufficient consideration.* On a bill in aid of execution to subject real estate conveyed by a father to his children to the payment of debts, evidence *held* sufficient to sustain a finding that the property was conveyed for a consideration less than half its value.

4. FRAUDULENT CONVEYANCES, § 271*—*when evidence sufficient to sustain finding that grantees had knowledge of grantor's indebted-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ness to creditor. On a bill in aid of execution to subject real estate which was conveyed by a father to his children for an inadequate consideration, consisting of the assumption of all the debts of the grantor except that owed to one creditor, evidence *held* sufficient to sustain a finding that grantees had notice of the indebtedness of the grantor to such other creditor.

5. FRAUDULENT CONVEYANCES, § 80*—*what constitutes voluntary gift of property invalid in equity.* The conveyance by a debtor of all his property to his children for a consideration, consisting of the assumption of all the debts of the grantor except one, which consideration is only about one-half the value of such property, constitutes a voluntary gift over to the assignees, and will be set aside in equity at the instance of such other creditor regardless of whether or not the grantees have knowledge of such other debt.

6. FRAUDULENT CONVEYANCES, § 87*—*when no presumption as to lack of good faith arises from sale to relatives.* A debtor in failing circumstances may convey his property to his relatives, and if there are no indications of fraud no presumption arises from the relationship.

7. FRAUDULENT CONVEYANCES, § 87*—*when to be considered to impeach conveyance.* The fact of relationship between an indebted grantor and the grantee of property may be considered with other evidence as tending to impeach the conveyance.

8. FRAUDULENT CONVEYANCES, § 65*—*what is badge of fraud.* Inadequacy of consideration for the conveyance of property by an indebted father to his children is a badge of fraud.

9. APPEAL AND ERROR, § 365*—*when grantee of property set aside as invalid against creditor not entitled to decree for reimbursement of consideration paid.* A grantee of property which is set aside as invalid against creditors is not entitled to protection in equity for the payment of part of the consideration, where he fails to ask such protection from the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Edward Thompson Company, Appellant, v. Martin C. Decker, Appellee.

Gen. No. 6,179.

1. CONTRACTS, § 279*—*what is effect of rescission of contract.* The operation and effect of a rescission of a contract is to terminate all the rights of the parties under the original contract.

2. SALES, § 284*—*when right of seller to recover purchase price not affected by storage of goods subject to order of purchaser.* Where a contract of sale is rescinded by the purchaser, the right of the seller to recover the purchase price is not affected by the fact that the purchaser delivers the goods to the seller and they are stored by the seller subject to the purchaser's order.

3. SALES, § 284*—*when seller may bring action of quantum meruit on abandonment of contract by purchaser.* Where books are sold under a special contract, the seller may, upon default of the purchaser, treat the contract as abandoned or "rescinded" and bring an action of *quantum meruit*, and the price is governed by the stipulation in the abandoned contract.

4. APPEAL AND ERROR, § 1802*—*when cause must be remanded for further proceedings upon reversal.* In the absence of a waiver of the right to trial by jury, a judgment for plaintiff may not be entered upon reversal of the judgment for defendant, but the cause must be remanded for further proceedings.

Appeal from the Circuit Court of Lake county; the Hon. CLAIRE C. EDWARDS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 8, 1916.

COOKE, POPE & POPE, for appellant.

RALPH J. DADY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellee, Martin C. Decker, August 31, 1909, sent a subscription contract for twenty volumes of American and English Annotated cases at five dollars a volume,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to appellant, Edward Thompson Company, which was by it accepted. The contract provided for payment of five dollars cash, and the balance in instalments of five dollars, payable quarterly for one year, and afterwards bimonthly, and contained an agreement that the right of property in all the volumes unpaid for should remain in appellant until the same were wholly paid, and a statement that no representations or guaranties had been made by the salesman on behalf of appellant which were not expressed in the written contract. At that time only thirteen volumes had been published, and they were delivered to appellee September 3, 1909. The three succeeding volumes were also delivered from time to time, as published, by August 26, 1910. Appellee paid four of the five dollar instalments, as provided in the contract, and in December, 1910, shipped back to appellant the sixteen volumes with the statement that he had not found the work up to the representations of their solicitor, and had received no benefit from it, and therefore returned it. Several letters followed in which appellant all the time insisted that it would not consent to take back the books and release appellee on the contract, and appellee insisted that he would not make further payment or receive further books. The sixteen volumes returned were stored by appellant and appellee promptly notified that they were held subject to his order. Finally, July 14, 1913, appellant commenced this suit before a justice of the peace for sixty dollars, the balance unpaid for the sixteen volumes at five dollars a volume. It was tried on appeal in the Circuit Court where there was a verdict and judgment for the defendant, from which judgment this appeal is taken. Appellant treated the contract as abandoned by appellee, and claimed the right to recover for the sixteen volumes furnished at the contract price. Its right to so recover would be free from question but for the fact that on the trial the deposi-

tion of an agent of appellant was read, in which he said that December 30, 1910, appellant treated the contract "as being repudiated by the defendant and rescinded by the plaintiff," and also said "at the time defendant repudiated contract by shipping back the books to plaintiff, there was then no further volumes of such publication manufactured, and when further volumes were manufactured plaintiffs did not ship more volumes to defendant because the latter had repudiated his contract, and the plaintiff then rescinded it." This use of the word "rescinded" is relied on by appellee as indicating that appellant consented to an entire abrogation of the contract, had taken back the books, and therefore could not recover on the contract, and he says there is no evidence upon which to base any other recovery. It is true that the operation and effect of a rescission of a contract is to terminate all the rights of the parties under the original contract. The title to the goods is revested in the seller and he cannot maintain an action for the price. (35 Cyc. 158.) If appellant had consented to take back the books this rule would apply, but appellant did not take back the books and its right to recover here is not affected by the fact that appellee delivered the books to appellant and it held them subject to his order. It is settled law in this State that where work has been done or goods furnished under a special contract, the laborer or vendor may, because of the default of the other party, treat the contract as abandoned and bring an action for the *quantum meruit* of the work, and that the price is governed by the stipulation in the abandoned contract. This rule is said in *Folliott v. Hunt,* 21 Ill. 654, to have been repeatedly held by that court. It was repeated in *Dobbins v. Higgins,* 78 Ill. 440, where the plaintiff had given notice that it would treat the contract as "rescinded" and abandon the work. Notwithstanding the use of that word "rescinded," the court treated the contract as

abandoned and held a right of recovery *pro tanto* at the contract price. In *City of Chicago v. Sexton,* 115 Ill. 230, it is held that where one is prevented from completing the contract by an unauthorized declaration of a forfeiture, he may recover for material furnished under the contract, but the price must be fixed by the stipulations of the contract so far as they can be applied. In *Keeler v. Clifford,* 165 Ill. 544, the right of a party to a contract to abandon it because of the default of the other party and recover the amount due on the basis of the price named in the contract is held. To the same effect is *Rice v. Partello,* 88 Ill. App. 52, and *Chicago Training School v. Davies,* 64 Ill. App. 503, and many other Illinois cases.

It is hardly necessary to enter into a discussion of the meaning of the word "rescinded" in this connection. It may be that the word "abandoned" should be used instead, but our Supreme Court in *W. H. Purcell Co. v. Sage,* 200 Ill. 342, speaking of a case where the vendor of coal ceased delivery under the contract because of the failure of the vendee to pay as agreed and sued for the contract price of coal that they had delivered, said: "Appellees were justified in declaring the contract rescinded. * * * They were entitled to recover at the contract price for coal they had delivered." Counsel for appellant in their argument use this term "rescinded" in the sense that the Supreme Court did in that case, and it is evident that appellant's witness used it in the same sense, and whatever the propriety of using that word with that meaning, it is very clear that it must be so interpreted in the decision of this case.

It is therefore evident that appellant was entitled to a judgment in its favor, and the court erred in overruling its motion for a new trial. In the absence of a waiver of the right to trial by jury, we have no power to reverse the judgment and enter a judgment for plaintiff's damages and costs in the court below. (*City*

of Spring Valley v. Spring Valley Coal Co., 173 Ill. 497.) The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Reversed and remanded.

Ralph Jester, Appellant, v. David S. Lee, Appellee.

Gen. No. 6,182. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by Ralph Jester, plaintiff, against David S. Lee, defendant, to recover commissions for the sale of real estate. From a judgment for plaintiff, defendant appeals.

CLARENCE W. HEYL and HARRY C. HEYL, for appellant; HEYL & MCGRATH, of counsel.

EVANS & EVANS, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 7*—*when evidence sufficient to sustain finding that contract to sell property not made.* In an action by a broker for commissions, where it appeared that the owner had practically arranged a sale of property to the purchasers, evidence *held* sufficient

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to sustain a finding that the owner did not enter into a contract with the broker to find a purchaser for the property.

2. BROKERS, § 95*—*when requested instruction that plaintiff had furnished buyer properly refused.* In an action by a broker for commissions, a requested instruction including a holding that plaintiff had proved by the greater weight of evidence that he furnished the buyer, *held* properly refused, there being sufficient evidence to sustain a finding that a contract was not entered into.

3. INSTRUCTIONS, § 114*—*when requested instruction properly refused as inapplicable to issues.* In an action by a broker to recover commissions for the sale of real estate, a requested instruction that the measure of recovery was what the services were reasonably worth, *held* properly refused where no question of value of the services was in issue and it was uncontradicted that such services, if rendered, were worth more than plaintiff claimed.

4. BROKERS, § 84*—*what evidence inadmissible.* In an action by a broker for commissions, evidence that the officers of the purchaser and the seller of the property were not on speaking terms, and that an officer of the purchaser never talked with the seller about the purchase before a slip of paper with the price of property marked thereon, which the broker had received from the seller and had given to one officer of the purchaser, was given by such officer to another officer of the purchaser, *held* inadmissible where it was not claimed that such latter officer had seen the owner before he got the slip of paper, and it appeared that he did in fact go to the owner and negotiate the sale of the property.

Frank Oscar Johnson, Administrator, Appellee, v. City of St. Charles, Appellant.

Gen. No. 6,186.

1. NEGLIGENCE, § 95*—*what degree of care required of children.* A child is not required to exercise the same degree of care to avoid injury as an adult, but only such care as a child of his age, intelligence, experience and capacity would ordinarily exercise.

2. NEGLIGENCE, § 4*—*what degree of care required not to injure children.* Adults must take notice of the lack of judgment, caution

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and discretion in children and their consequent inability to take care of themselves, and conduct business with that in view and reasonably guard against injuring them.

3. NEGLIGENCE, § 201*—*when contributing negligence of child is for jury.* Although the evidentiary facts are undisputed, still the question of contributory negligence is one of fact for the jury and not of law for the court, unless all reasonable minds must agree as to the conclusion to be drawn from the admitted facts.

4. ELECTRICITY, § 28*—*when contributory negligence of child in handling live wire for jury.* In an action for the death of a boy ten years of age who, while traveling on a highway, left it to examine a fallen electric wire on land adjoining a public highway, and was killed upon touching the exposed end of the wire while handling it, *held* that it was a question for the jury whether the deceased was guilty of contributory negligence.

5. ELECTRICITY, § 27*—*when evidence sufficient to sustain finding that city was guilty of negligence in failing to repair break in electric wire.* In an action against a city for the death of a boy ten years of age, as the result of his handling a live wire in a field adjoining a public highway, where it appeared that the line had been in operation three or four weeks and that a severe storm occurred two days before the accident, evidence *held* sufficient to sustain a finding that defendant was guilty of negligence in failing to investigate and repair the line.

6. ELECTRICITY, § 9*—*what degree of care must be taken to prevent injury to persons from current of electric light supply line.* An electric light supply line is a dangerous agency, and care commensurate with the danger must be taken to prevent injury to persons from the electric current.

7. TRESPASS, § 11*—*what does not constitute trespassing on premises of city.* A boy who leaves the public highway and goes into a field, which a city has a license to use for its electric light supply line, to experiment with a fallen electric light wire, is not a trespasser on premises of the city, regardless of whether or not he was a trespasser as against the owner of the land.

8. ELECTRICITY, § 25*—*when not presumed that boy has full knowledge of danger from electric wire.* It is not to be presumed that a boy ten years of age has any knowledge of electricity and its dangers compared with workmen employed around electric wiring.

9. APPEAL AND ERROR, § 1772*—*when judgment not reversed.* A judgment should not be reversed where the record discloses no material error of law.

10. INSTRUCTIONS, § 47*—*when instructions which direct verdict may be refused.* Requested instructions advising the jury that plain-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tiff's decedent was guilty of negligence under the facts, *held* improper.

11. INSTRUCTIONS, § 153*—*when not duty of court to modify.* It is not the duty of the court to modify requested instructions which in effect direct a verdict.

12. APPEAL AND ERROR, § 1241*—*when party may not complain of modification of erroneous requested instruction.* One who asks a court to give an improper instruction cannot be heard to complain of the court's action in modifying it, although the court fails to make it good.

13. APPEAL AND ERROR, § 1544*—*when error in instructing jury to pass on question of contributory negligence as matter of law harmless.* Any error in an instruction in an action for negligent death, that it allowed the jury to pass on "contributory negligence" as a matter of law, *held* harmless where the jury were told in other instructions that the plaintiff was not entitled to recover unless the deceased was at and before the accident in the exercise of due care there defined.

14. DEATH, § 73*—*when not erroneous as telling jury to consider all the evidence in determining damages for negligent death.* An instruction in an action for negligent death, that if the jury believed from a preponderance of the evidence in the case that the defendant was guilty as charged in plaintiff's declaration or some count thereof, then in determining the amount of damages, if any, to be awarded to plaintiff as administrator, they should fix such amount for their verdict, as would, in their judgment, from all the evidence be a fair and just compensation to the next of kin of deceased for the pecuniary loss, if any, resulting to them by reason of his death, *held* not erroneous as requiring the jury to consider "all the evidence" instead of limiting their consideration to the facts and circumstances attending the injury.

15. DEATH, § 73*—*when instruction on damages in action for negligent death not bad as ignoring defense of contributory negligence.* An instruction on damages for negligent death is not bad as ignoring the defense of contributory negligence where it does not direct a verdict, but is only intended to guide the jury in assessing damages, if they find the defendant guilty.

16. DEATH, § 73*—*when instruction in action for negligent death limiting recovery to pecuniary damages proper.* In an action for the negligent death of a child, an instruction on damages *held* proper as confining the jury to pecuniary damages.

17. APPEAL AND ERROR, § 1542*—*when instruction on damages not reversibly erroneous.* An instruction on damages cannot be *held*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

reversibly erroneous where there is no claim, or ground for claim, that the damages are excessive.

Appeal from the Circuit Court of Kane county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

JOHN A. RUSSELL and CHARLES L. HUNT, for appellant.

C. HELMER JOHNSON and LEONARD MEAD, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

The appellant, City of St. Charles, operated an electric plant with poles and wires extending along a much traveled public highway north from the city. On Monday, September 23, 1912, appellee's intestate, Walter Johnson, a boy ten years old, was walking along that highway at a point within a mile of the business part of the city with Nils Nelson, a boy about twelve years old. There had been a severe storm of the previous Friday, and one of the electric wires was broken and hanging with the end lying on the ground inside the field adjoining the public highway. Walter ran to the side of the road, climbed through the fence, and took hold of the insulated wire about two feet from the end, which was harmless. He then touched the end of the broken wire, which was uninsulated and described as bright and "shiny," and received a shock from which he immediately died. He was warned by his companion and knew when he did this that there might be danger from touching the wire. The wire was down Saturday morning, two days before the accident. There is evidence tending to prove that appellant was actually notified of this condition on Saturday; but there is a conflict on that question, and whether appellant

in the absence of actual notice in time to repair the wire is charged with constructive notice is a pertinent inquiry. The poles and wires were placed there by permission of the owner of the land. There was no reason why deceased should go through the fence or touch the wire except the prompting of boyish curiosity. This action was brought to recover for that injury, and on a jury trial there was a verdict and judgment of $2,500 for the plaintiff. The record is brought here on appeal.

It is first insisted that under the above stated facts deceased was guilty of contributory negligence as matter of law, and that the court erred in not directing a verdict for the defendant. In *Trapp v. Rockford Elec. Co.*, 186 Ill. App. 379, we considered the degree of care required of children and discussed several holdings of our Supreme Court on that question, and noted the purpose of the law "to protect children against their lack of sound judgment." It was said in *Sutton v. Arrow Transfer Co.*, 186 Ill. App. 188: "A child is not required to exercise the same degree of care as an adult, but only such care as a child of his age, intelligence, experience and capacity would ordinarily exercise." In the late case of *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, the court citing many authorities said: "A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use." The law recognizes the lack of judgment, caution and discretion in children and the consequent inability to take care of themselves, and requires adults to take notice of these tendencies and conduct business with that in view and reasonably guard against injuring them. Accident cases are very numerous in which children have been held not guilty of contributory negligence where adults would clearly have been found not in the exercise of ordinary care for their own safety. Whether in the present case de-

ceased was exercising such care for his own safety as boys of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use, is a question of fact to be first passed on by the jury unless there is only one reasonable conclusion. What a ten-year-old boy of the kind and character pictured in legal definitions would naturally and ordinarily do is a question that laymen are quite as well qualified to answer as are judges and lawyers. It involves a consideration of many factors. No fixed rule can be applied even in cases of children of equal age and natural capacity. Thompson on Negligence, vol. 1, sec. 309; *Hartnett v. Boston Store of Chicago, supra.* Although the evidentiary facts are not disputed, still the question of contributory negligence is one of fact for the jury and not of law for the court, unless all reasonable minds must agree as to the conclusion to be drawn from the admitted facts. That it is not for the court to direct the jury as to what facts do or do not constitute negligence hardly requires citation of authority. The rule is held or recognized in *Lake Erie & W. R. Co. v. Klinkrath,* 227 Ill. 439; *Commonwealth Elec. Co. v. Rose,* 214 Ill. 545; *Illinois Iron & Metal Co. v. Weber,* 89 Ill. App. 368; *Christiansen v. Navigato,* 185 Ill. App. 318; *Kelly v. Commonwealth Elec. Co.,* 167 Ill. App. 210, and many other cases. Of course, all statements that contributory negligence is a question of fact for the jury are to be read remembering that any contention as to any claimed fact may become a matter of law for the court instead of a question of fact for the jury if the evidence is so clear that there can be but one reasonable conclusion from it. In our opinion it cannot be said in the present case that deceased, as matter of law, was not measuring up to the required standard in letting his boyish curiosity lead him to experiment with the broken wire. We think that question was properly left to the jury, and that their conclusion was not so unreasonable as to require the trial

court to disregard it, or permit this court to reverse the case on that ground.

The jury were justified in finding the defendant negligent. Its line was properly constructed and had been in operation three or four weeks before the accident. The break was within about a mile of its power plant and on the Elgin road. There was a severe storm on Friday night which should have warned appellant of the danger of such an accident. It was dealing with a destructive agency which required care commensurate with the danger. *Commonwealth Elec. Co. v. Melville,* 210 Ill. 70. And even if the jury were not justified in finding actual notice to appellant on Saturday, still we think they were warranted in charging appellant with negligence in not learning the danger and repairing the line before the accident happened, considering the location of the wire, its nearness to the city and the plant, and the danger to be anticipated from neglecting investigation of the line after a severe storm.

It is argued that deceased was a trespasser and therefore appellant owed him no duty except not to wantonly injure him. If the field entered by deceased had been owned or controlled by appellant a different question might arise. But it was the land of a third party, appellant was there by permission of the owner and whether deceased was there under an implied license, which often arises from custom in the country to go on foot onto fields adjacent to the highway, or was trespassing as against the owner of the land, he was not trespassing on the premises of appellant. Appellant had no authority to forbid deceased from going upon that field, therefore, as against the appellant, he was rightfully in the field where he was injured. The case is to be distinguished from those in which an accident occurs to a trespasser upon the property of the defendant. The wire fell within the field adjoining the highway, but we think that fact should not make ap-

pellant less liable than if it had fallen on the roadside of the fence.

There is no question that deceased was a bright, intelligent boy. He was a farmer boy, probably not much acquainted with the operation of electricity. He knew when he touched the wire that he might receive a shock, and quite likely knew cases where boys had touched electric wires and received slight shocks. There is nothing in the evidence to show, and it is not to be presumed, that he had any knowledge of electricity and its dangers compared with workmen employed around electric wiring. The judgment should not be reversed unless the record discloses material error of law.

Appellant offered four instructions, each, in substance, advising the jury that deceased was guilty of negligence under the facts which the instructions recited and which were not controverted. The court modified each of those instructions by inserting, "If you believe such acts on his part were contributory negligence," leaving the jury to determine whether the conclusion from the admitted facts was that the boy was negligent instead of determining that question as a matter of law. Each of these instructions practically directed a verdict and might well have been refused. It was not the duty of the court to amend or modify the instructions (*Rolfe v. Rich*, 149 Ill. 436), though he might do so if he desired. The Appellate Court of the fourth district lately held in *Grannon v. Donk Bros. Coal & Coke Co.*, 173 Ill. App. 395, that one who asks the court to give an improper instruction cannot be heard to complain of the court's action in modifying it, although the court fails to make it good. It held the same rule in *Wilkerson v. Willis Coal & Mining Co.*, 158 Ill. App. 620, and in earlier cases there cited. *Ryan v. Donnelly*, 71 Ill. 100, cited and approved in *Crown Coal & Tow Co. v. Taylor*, 184 Ill. 250, seems to support that holding. But without attempting to fix the limitations of that rule, it is sufficient in this case to

say we see no substantial error in the instructions, as modified. It is objected that they left the jury to pass on "contributory negligence" as matter of law, but the jury were told in other instructions that the plaintiff was not entitled to recover unless the deceased was at and before the time of the accident in the exercise of due care there defined, and there is no reason to suppose that they would conclude from this instruction that he might recover if he did not measure up to the standard of care required by the other instructions.

The court, at the instance of appellee, gave the jury the following instruction: "If you believe from a preponderance of the evidence in this case that the defendant is guilty as charged in plaintiff's declaration, or some count thereof, then, in determining the amount of damages, if any, to be awarded to the plaintiff as administrator, you should fix such amount for your verdict as will, in your judgment, from all the evidence be a fair and just compensation to the next of kin of deceased for the pecuniary loss, if any, resulting to them by reason of his death." It is urged that this instruction is bad because it tells the jury in assessing the damage to consider "all the evidence" while it should have limited the consideration to the facts and circumstances attending the injury. A similar objection to a similar instruction was denied by the court in *Chicago City Ry. Co. v. Gemmill,* 209 Ill. 638, and it was there said that an instruction in substantially the same form had been approved by the court in many cases there cited. It is also urged that the instruction is bad as ignoring the defense of contributory negligence. The answer to that objection is that it does not direct a verdict, but is only intended to guide the jury in assessing damages, if they find the defendant guilty. This objection goes to the first part of the instruction, where the jury are told if they believe, etc., that the defendant is guilty as charged in plaintiff's declara-

tion, or some count thereof. Instructions similar in this respect have been approved in *Pennsylvania Co. v. Marshall,* 119 Ill. 399, and numerous later cases citing that case, among them *U. S. Brewing Co. v. Stoltenberg,* 211 Ill. 531, citing a great number of earlier cases. The instruction properly confined the jury to pecuniary damages. So far as it is to be considered as an instruction on the measure of damages, it would not, if erroneous, work a reversal of the judgment, for there is no claim, nor ground for claim, that the damages are excessive.

The court refused two instructions offered by the defendant, each of which would, if given, have informed the jury that the conclusion from the practically admitted facts in the case was that deceased was negligent and plaintiff could not recover. There was no error in refusing these instructions. We are of the opinion that the record discloses no substantial error of law. The judgment is affirmed.

Affirmed.

Louise C. Greenacre, Appellee, v. Aurora Brewing Company et al., Appellants.

Gen. No. 6,187.

1. INTOXICATING LIQUORS, § 209*—*when declarations as to intention to commit suicide inadmissible in action by wife for loss of support.* Declarations made by one who is killed by a train as the result of his lying on the track while intoxicated previous to his death, as to his intention to commit suicide and to throw himself in front of a train, must be regarded as hearsay and inadmissible, in evidence in an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife for damages for loss to her means of support

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

caused by the intoxication of her husband and his consequent death, when unaccompanied by some attempt at the time to carry them into execution.

2. INTOXICATING LIQUORS, § 225*—*when evidence shows intoxication at time of death.* In an action under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), by a wife for damages for loss to her means of support as the result of the intoxication and resulting death of her husband by a railroad train, evidence *held* sufficient to sustain a finding that deceased was so intoxicated at the time of his death as to be unable to take care of himself.

3. APPEAL AND ERROR, § 1542*—*when instruction on amount of recovery not reversibly erroneous.* Any error in giving an improper instruction on the measure of damages is harmless where there is no claim, and no ground for claim, that the damages are excessive.

NIEHAUS, J., dissenting.

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

ALSCHULER, PUTNAM & JAMES, for appellants.

JOHN M. RAYMOND and JOHN K. NEWHALL, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal from a judgment of $3,063.75 rendered on a verdict of $3,000, with interest added to date of judgment, in a suit brought by appellee against two saloon keepers and the Aurora Brewing Company, the owner of one of the saloon buildings, under section 9 of our Dramshop Act (J. & A. ¶ 4609), for loss of means of support caused by the intoxication of her husband and his consequent death.

Frank Greenacre, the husband, was about forty-five years of age, with an earning capacity of about $1,500 a year, residing with his family in the Village of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hinckley, Illinois. There was a curve in the railroad track running through the village so that at that point an object on the track could not be seen a great distance. Saturday, November 15, 1913, a fast train was passing through the village at 11:30 p. m. Greenacre was lying on the track with his head on one rail and his feet extending to or on the other rail, and was struck by the train and instantly killed. He had been on the track less than an hour. Another train had passed over the track about fifty minutes before. The theory of appellee is that Greenacre was so intoxicated as to be unable to take care of himself and for that reason was in this place of danger. Appellants claim that he was not so intoxicated as to render him incapable, but that he deliberately took that way to commit suicide. Appellants, on the trial, offered proof by several witnesses of declarations of the deceased at various times before his death showing an intention to take his own life. The witnesses were produced in court and testified out of the presence of the jury for the purpose of advising the court just what their evidence would be. One said that he met Greenacre in the latter part of August, 1913, and he then made a statement indicating an intention to take his own life; and that he met him again on the day he was killed between twelve and one o'clock and deceased told him he was tired of the game and the witness would never see him again. Another testified that he and deceased were acquainted with a man who had committed suicide by jumping in the river about two years before, and several times in talking about the matter, Greenacre told the witness that he would never commit suicide by jumping in the river but when he got ready to go he would throw himself in front of the fast train; that two weeks before Greenacre's death the witness met him in town after eleven o'clock at night and Greenacre asked him to have a drink with him saying it would probably be the last

drink they would have together, and just then the limited train went through the town (the one that afterwards struck deceased) and Greenacre said that train is apt to hit me any night; that many times within six months of Greenacre's death when the witnesses were working for him, as they stepped across the railroad track, Greenacre had said: "Right there is where I would like to jump in front of the fast train." Two other witnesses testified to sitting one evening in the latter part of August with Greenacre near the railroad track and talking about lights on the track, and Greenacre mentioned the curve of the track where the light did not show, and said if anybody was on the track the engineer would not see him until the train was right on him, and that was the place where deceased was afterwards killed. Another witness said he helped Greenacre load stock the Sunday evening before he was killed and Greenacre told him that was the last load he was going to ship. The court permitted none of this testimony to go to the jury and the record properly presents the question here whether any of it was competent. Counsel devote the larger part of their briefs to this question, and we will first consider it. If the court erred in excluding this testimony it was certainly reversible error.

Counsel for appellants do not claim, and we see no ground for any assumption, that these declarations were a part of the *res gestæ*, or that they were accompanied by some attempt at the time they were made to carry them into execution. But appellants' counsel cite and review a number of authorities holding such declarations competent, notwithstanding they are not a part of the *res gestæ*. The question has usually arisen in homicide cases and in actions on life and accident insurance policies. It was carefully considered by our Supreme Court in the homicide case of *Siebert v. People*, 143 Ill. 571, the leading authorities were discussed

and reviewed, and the conclusion reached that such declarations not accompanied by an act of the deceased that they might explain, were hearsay and not admissible. The court relied on *Commonwealth v. Felch*, 132 Mass. 22, among other authorities, in support of its conclusion, and expressly refused to follow the Supreme Court of Massachusetts in overruling that case in the later case of *Commonwealth v. Trefethen*, 157 Mass. 185. The latter case is well said by appellants' counsel to be the greatest case on the subject. It is said by the author of the notes in 24 L. R. A. 235, to be a notable case on the subject of evidence of declarations of intention when not a part of the *res gestæ*. It, however, loses its value as authority in this State because the Supreme Court in *Siebert v. People, supra*, on page 588, speaking of the case, said: "This decision, although rendered by a court of high standing, we do not regard in harmony with the current of authority, and we are not inclined to follow it. If a declaration of that character was accompanied with any act tending to show an intent to commit suicide, it might be admissible in connection with the act."

The *Siebert* case, *supra*, was cited and approved on this point in *Howard v. People*, 185 Ill. 552, and *Clark v. People*, 224 Ill. 554. It was cited and its doctrine approved in *Nordgren v. People*, 211 Ill. 425, but the rule is there said to be limited to cases where the declarations offered in evidence are not a part of the *res gestæ*, or accompanied by any act of the deceased which they might characterize or explain, but are mere naked declarations offered as original evidence. In that case it appeared that the deceased kept in her room bottles and flasks of whisky and strychnine poison, and as explanatory of those acts she made declarations showing an intent to commit suicide, which were held competent and part of the *res gestæ*, not as original evidence but as explanatory of the acts in question. It is said in 21 Cyc. 902, that such declarations

are admissible in homicide cases, but in a note the author cites *Siebert v. People, supra,* and *State v. Fitzgerald,* 130 Mo. 407, and says that such declarations are held not competent in Illinois and Missouri if not accompanied by some attempt at the time to carry them into execution, or when not made a part of the *res gestæ,* or admissible as dying declarations.

The authorities are quite fully reviewed in *State v. Fitzgerald, supra,* among them *Mutual Life Ins. Co. v. Hillmon,* 145 U. S. 285, which is much relied on by appellants here. The Missouri court concluded that a different rule does and should prevail in actions on life insurance policies; that under such contracts the admissions or statements by either party with respect to the subject-matter of controversy may be shown by the adverse party; that the difference between the two classes of cases in this respect is "broad as a gulf." Apparently our Supreme Court has recognized a distinction between the two classes of cases, for in *Treat v. Merchants' Life Ass'n,* 198 Ill. 431, the court, without referring to the holdings in the homicide cases, held that in an action on a life insurance policy where it is claimed the insured committed suicide, the testimony of the agent who took the application for insurance that before the policy was delivered the insured asked him if his company paid losses on suicides, and on learning it did not made some remark about canceling his application, was admissible as tending to show that the insured had in his mind the question of suicide at the time he took out the insurance, and bearing on the question whether or not he took his own life. In actions on life insurance policies the plaintiff is claiming under a contract of the deceased. Perhaps for that reason the rule is different from that in homicide cases, but whatever may be the reason for the distinction, it seems quite clear that the rule applied in life insurance cases should not govern in homicide cases, and that it would seem that the rule of evidence

applicable to homicide cases should be applied to this character of a case under the Dramshop Act. There is certainly no privity of contract here between the deceased and the plaintiff in the action. We are of the opinion that the trial court did not err in its ruling on the offered evidence.

Appellants argue that the evidence does not sustain the finding that deceased was so intoxicated at the time in question as to render him incapable of taking care of himself. There was a sharp conflict in the evidence on that question. It was for the jury to decide under the direction and control of the trial judge. The verdict was not so manifestly against the weight of the evidence as to authorize us to disturb it.

A number of questions arising on the introduction of evidence and manner of examining witnesses, and remarks of counsel, are presented and argued by appellants. None of them seem to us of controlling importance. Some slight errors were committed as must always happen in a bitterly contested case of this character. We reach the same conclusion in considering error assigned on giving and refusing instructions. The court gave over twenty instructions at the instance of defendants in which the law was as favorably stated as they should ask. There is some ground of complaint as to one of plaintiff's instructions on the evidence to be considered in assessing damages, but there is no claim, and no ground for assuming that the damages are excessive.

There is no question but that deceased drank intoxicating liquor at the two appellants' saloons on the day of his death, or that the brewing company owned one of the buildings and rented it for saloon purposes. We are of the opinion that no reversible error was committed on the trial, therefore the judgment is affirmed.

Affirmed.

MR. JUSTICE NIEHAUS.—I do not concur in this opinion.

Laura S. Thompson, Plaintiff in Error, v. Ancient Order of Gleaners, Defendant in Error.

Gen. No. 6,193. (Not to be reported in full.)

Error to the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by Laura S. Thompson, plaintiff, against Ancient Order of Gleaners, defendant, to recover on a benefit certificate on the life of her husband. From a judgment for defendant, plaintiff brings error.

ROBERT CARR and BUTTERS & CLARK, for plaintiff in error.

H. M. KELLY, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE—*when evidence sufficient to sustain finding that insured did not pay money to treasurer of local order to cover delinquent assessments.* In an action on a death benefit certificate issued by a fraternal beneficiary society, evidence *held* sufficient to sustain a finding that insured did not make payment of delinquent assessments to the treasurer of the local order.

2. INSURANCE, § 782*—*when failure to pay dues and assessments constitutes automatic suspension of member of fraternal beneficiary society.* The failure of a member of a fraternal beneficiary society to pay dues and assessments causes his automatic suspension under laws of the society, providing that the failure to pay dues or assessments operates as a suspension of a member.

3. INSURANCE, § 807*—*how member of fraternal beneficiary so-*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ciety automatically suspended for failure to pay dues and assessments may be reinstated. Where a member of a fraternal beneficiary society has been automatically suspended under the laws of the society because of his failure to pay dues and assessments, he cannot become reinstated without complying with the requirements of the society unless some one with authority waives such requirements.

4. INSURANCE, § 797*—*when receipt of dues and assessments by local officer does not constitute waiver of requirement for reinstatement in fraternal beneficiary society.* The receipt of dues and assessments from a member of a fraternal beneficiary society, who has been automatically suspended because of his failure to pay dues and assessments as required by the laws of the society, by the local secretary and treasurer, does not constitute a waiver of a requirement for the production of a certificate of good health as a condition for reinstatement, so as to constitute a reinstatement, where such local officer at the time of taking the money advised the member that it was doubtful whether he could be reinstated and that it must depend upon the action of the superior officers of the company.

5. DEPOSITIONS, § 40*—*when objections to interrogatories must be made before trial.* Objections to interrogatories in a deposition as to books and documents, copies of which are sought to be used in evidence, that sufficient foundation was not laid for their introduction in evidence, must be made before the trial.

6. DEPOSITIONS, § 43*—*when questions as to competency of interrogatories not considered on appeal.* Where there is no reasonable presumption from the record that anything got into evidence that could not easily have been made competent by a retaking of a deposition, if the questions had been held bad on a motion to suppress, questions raised on appeal, as to competency of interrogatories, that should have been first raised on the taking of the deposition or on the motion to suppress, will not be considered.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Madeline Harris by Mary E. Harris, Appellee, v. Fred Schlink, Appellant.

Gen. No. 6,196.

1. TRIAL, § 68*—*when party not required to state facts to be proved by answer to question.* Where a question is in proper form and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, the party is not bound to state the facts proposed to be proved by the answer unless the court requires him to do so.

2. FALSE IMPRISONMENT, § 35*—*when evidence admissible in mitigation of exemplary damages.* In an action by a girl fourteen years of age for damages for false imprisonment by a saloon keeper who detained her and turned her over to the police while she, with a party of children, was passing defendant's saloon, and some one had thrown open the door of the saloon and broken the glass, *held* that evidence that defendant had been instructed, upon a prior complaint to a policeman, to catch parties making disturbances and get their names or send them to the police station, and that he would see that the disturbances were stopped, was admissible in evidence in mitigation of exemplary damages.

3. APPEAL AND ERROR, § 1523*—*when error in instruction harmless.* In an action by a child for damages for false imprisonment, any error in an instruction on the right of a private person to make an arrest for a crime committed or attempted in his presence, *held* harmless where there was little question as to the right of the defendant to arrest and detain the plaintiff.

4. INSTRUCTIONS, § 155*—*when method of modification to be condemned.* The practice of modifying instructions, leaving the part struck out so that the jury can read it, is to be condemned.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 8, 1916.

JOHN B. KING and LEO G. HANA, for appellant.

DAILEY & MILLER, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE CARNES delivered the opinion of the court.

April 1, 1914, Fred Schlink, the appellant, conducted a saloon in Peoria. There had been a children's party in the neighborhood that evening, and about ten o'clock they were on their way home by circuitous routes, loitering, laughing and playing after the manner of children. Several of them, including Madeline Harris, the appellee, a girl fourteen years old, passed appellant's saloon. Another smaller party of children appeared at that point about the same time. Some one violently threw open the front door of the saloon, breaking the glass. Appellant was sitting in a rear room with a retail merchant of the vicinity. He rushed out of doors. The children ran. He caught Madeline and led her back to the saloon and sent for the police patrol wagon which came and took her to the police station. Appellant meantime telephoned the police station that he only wanted to teach the children a lesson and to lecture her and let her go, which was done. This action was brought to recover for that injury. A jury returned a verdict in favor of plaintiff for $2,250. The court required a remittitur of $1,000 and entered judgment for $1,250 and costs. The defendant prosecutes this appeal and urges that the evidence does not support the verdict; that the court erred in excluding evidence offered by the defendant, and in instructions to the jury, and that the verdict is excessive.

There is some evidence that appellant had before been annoyed and troubled by children trespassing upon his property; that he had complained to a policeman about it and had been told by him to catch the parties and get their names, or send them into the station, and that he would see that the disturbances were stopped; and while the evidence fairly shows that Madeline, the appellee, was not guilty of any trespass on defendant's property, and that there was no valid

reason for his seizing and detaining her, and that his action in so doing was hasty and foolish, still a very material consideration is what cause, if any, was there for his acting in the manner that he did. The girl was not injured apparently more than would naturally result from being caught and struggling to get away, and being frightened. It is not clear from the evidence how much she was injured, and what were the after effects; but there is no question that the verdict was much beyond what could reasonably be found even including exemplary damages, and it is peculiarly a case where a jury would be much influenced by what might seem to them outrageous conduct of the defendant. It was therefore very material to appellant that he be permitted, within the rules of evidence, to show anything he could by way of excuse for his action in defense of exemplary damages. He produced the police officer above mentioned as a witness, and offered to prove by him the conversation before stated. The court sustained an objection to this testimony. Appellant afterwards, as a witness in his own behalf, was permitted to testify to the conversation and it was not contradicted, still it probably did not impress the jury so much as if it had been stated by the officer. While appellant was testifying in his own behalf, in speaking of the throwing open of the door to his saloon, he was asked how many times that occurrence had taken place that same night. This question was objected to as incompetent and immaterial; which objection the court sustained on the statement by appellant's counsel that he could not show that it was done by the plaintiff or those parties. He was then asked: "Was there a disturbance at your front door more than one time that night?" and: "Were there three or four disturbances at your front door on that same evening?" his counsel stating that the testimony was offered to show want of malice. Objections were sustained to each of these

questions. While there was no statement by counsel of what answer was expected, still under the authority of the late case of *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, where it is said: "Where a question shows the purpose and materiality of evidence it is not necessary to state what the answer would be. If a question is in proper form and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, the party is not bound to state the facts proposed to be proved by the answer unless the court requires him to do so. (38 Cyc. 1330; *Buckstaff v. Russell & Co.*, 151 U. S. 626)," such statement was not necessary.

This action of the court is properly presented here for review. If the rules of evidence permit that character of proof, there is little reason to doubt that its rejection was substantial and material error.

In *Roth v. Smith*, 41 Ill. 314, the defendant proved he was advised by persons not lawyers to make the affidavit under which plaintiff was arrested, and the court held this evidence competent, and said: "For the purpose of showing that he was not actuated by vindictive feelings, this evidence was proper, and if proper for any purpose it should always be admitted." This ruling of the court was cited and approved in *Cochrane v. Tuttle*, 75 Ill. 361. It was cited in *Merrifield v. Davis*, 130 Ill. App. 162, along with *Donnelly v. Harris*, 41 Ill. 126, in support of the conclusion of the court that evidence was improperly excluded that would not be competent in bar of the action, but was competent in mitigation of exemplary damages. It was held in the *Donnelly* case, *supra*, that while words do not justify an assault or false imprisonment, and will not mitigate the actual damages, they may be considered on the question of vindictive damages. In the present case, vindictive damages were asked and evidently given by the jury, therefore the general rule admitting evidence that is not competent in bar of the

action applies. The case of *Klein v. Pollard,* 149 Mich. 200, 10 L. R. A. (N. S.) 1008, is somewhat in point. It was an action against a police officer for the unlawful arrest of a woman who had come out of a saloon at midnight and was walking along the street. There was no reason for her arrest, but the defendant offered in evidence his instructions from his superior officers to go to that saloon every evening because it was disorderly and prostitutes frequented it. It was held that these instructions did not constitute a defense to actual damages, but as they tended to show the good faith of the defendant they were admissible in mitigation of damages. In *Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.,* 151 Wis. 537, the defendants were guilty of an unlawful interference with the liberty of the plaintiff in endeavoring to prevent him from leaving town, and it was held that while their motives for so preventing him might be to detain him until it could be ascertained whether he should be arrested were no defense to the action, that it was competent to give that matter in evidence in mitigation of damages; that if they mistakenly thought they were performing a legal duty, or that the plaintiff's reputation was so bad that their action was not likely to injure him in any great degree, that should be taken into consideration in mitigation of damages. In *Henry v. Hug,* 76 Mo. 342, defendant was sued for unlawfully and wrongfully killing the plaintiff's cow, and he offered to prove that the plaintiff's wife sold him the cow, which evidence was rejected by the trial court. The Supreme Court said the evidence was admissible on the question of exemplary damages, it being material on that question whether defendant believed that he had acquired the ownership of the cow. In *Camp v. Camp,* 59 Vt. 667, which was an action for damages for cutting and carrying away grass, and building a fence on the plaintiff's land, the action of fence viewers in establishing the line was relied on as a defense, and it was held they

had no official authority to do so. The trial court had excluded testimony as to their action, and it was held that as exemplary damages were asked and included in the verdict, the excluded testimony was material and admissible as bearing on that question as tending to show the motive under which the defendant acted, and it was said: "The plaintiff may show that the act was done with express malice; on the other hand, the defendant is entitled to the benefit of any facts and circumstances tending to show that he acted in good faith."

We are of the opinion that there was prejudicial and reversible error in excluding the testimony before referred to, and for that reason the judgment should be reversed and the cause remanded.

It is urged that the court erred in its instructions to the jury in regard to the right of a private person to make an arrest where a crime is attempted or committed in his presence; in modifying certain instructions by striking out certain parts, leaving them legible so that the jury could readily see what he had refused to state as the law; in repeatedly calling the jury's attention to their right to give exemplary damages; and in permitting the question of exemplary damages to go to the jury. As we have concluded to reverse the judgment for the reasons before stated, we will not pass on these questions further than to say that we think on the record before us there was a question of exemplary damages for the jury, and there was so little question of the right of the defendant to arrest and detain the plaintiff that there is no substantial error in the instructions as to that. The practice of modifying instructions, leaving the part struck out so that the jury can read it, has been condemned. But if that occurred here it will probably not occur on another trial. The judgment is reversed and the cause remanded.

Reversed and remanded.

MR. JUSTICE NIEHAUS took no part.

Dan J. Curran and Alice O. Curran, Appellees, v. J. H. Junk, Appellant.

Gen. No. 6,199. (Not to be reported in full.)

Appeal from the Circuit Court of Knox county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916.

Statement of the Case.

Action by Dan J. Curran and Alice O. Curran, plaintiffs, against J. H. Junk, defendant, to recover commissions for the exchange of real estate of defendant for other property. From a judgment for plaintiff for $5,900, defendant appeals:

WILLIAMS, LAWRENCE, WELSH & GREEN, for appellant.

M. J. DAUGHERTY and ROY M. MARSH, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 88*—*when evidence sufficient to show acceptance of offer to act as broker for specified commission.* In an action by brokers for commissions for the exchange of real estate, evidence *held* sufficient to sustain a finding that plaintiffs' proposition to act as brokers for a specified commission was accepted by defendant.

2. BROKERS, § 88*—*when evidence sufficient to sustain finding that terms of contract to act as broker not modified.* In an action by brokers to recover commissions for the exchange of real estate, evidence *held* sufficient to sustain a finding that the contract for commissions was not modified so that no commissions were to be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

paid until the property received in exchange was in turn exchanged for other property.

3. BROKERS, § 95*—*when instruction on burden of proof in action for commissions correct.* In an action by brokers for commissions for the exchange of real estate, an instruction that the burden of proof was upon the plaintiffs to show a contract for commissions and that the contract, if so shown, stood until a rescission or change was shown, and that the burden of proof was upon defendant to show a rescission or change, *held* correct.

4. BROKERS, § 95*—*when instruction improperly modified as not conforming to pleadings.* In an action by brokers for commissions for the exchange of real estate in Minnesota for property in another State, which latter property defendant claimed plaintiffs agreed as part of the contract to exchange for Illinois property, a requested instruction that if the jury believed that there was an agreement between plaintiffs and defendant to trade the foreign property for land in Illinois "or elsewhere" and the undertaking was not performed by plaintiffs they could not recover, *held* improperly modified by striking out the words "or elsewhere" on the ground that there was a departure from the pleadings, as, if a later and different agreement was made, it was admissible under the general issue.

5. APPEAL AND ERROR, § 1565*—*when error in modifying instructions as not conforming to pleadings harmless.* In an action by brokers for commissions for the exchange of real estate in Minnesota for property in another State, which latter property defendant claimed plaintiffs agreed as part of the contract to exchange for Illinois property, any error in modifying requested instructions that if the jury believed that there was an agreement between plaintiffs and defendant to trade the foreign property for land in Illinois "or elsewhere" and the undertaking was not performed by the plaintiffs they could not recover, on the ground that it was a departure from the pleadings to so instruct, *held* harmless where the jury had been informed in other instructions that if there was a later and different agreement the plaintiffs could not recover.

6. INSTRUCTIONS, § 151*—*when instructions covered by given instructions properly refused.* Requested instructions which are adequately covered by given instructions are properly refused.

7. NEW TRIAL, § 102*—*how motion for on ground of newly-discovered evidence should be supported.* A motion for new trial founded on newly-discovered evidence should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied upon, or some excuse should be shown for not obtaining them.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

8. APPEAL AND ERROR, § 1236*—*when neither party may complain of amount of verdict.* Where the jury are instructed by agreement of counsel, in an action by brokers for commissions for the exchange of real estate, that if they found for the plaintiffs to render a verdict for a stipulated amount, neither party can complain of the amount of the verdict.

Harry E. Brown, Appellant, v. W. B. Atwood, Appellee.

Gen. No. 6,201.

1. APPEAL AND ERROR, § 1034*—*when judicial notice taken of warrant of attorney not set out in bill of exceptions.* In the absence of a special demurrer to a declaration which expressly makes a part thereof and files therewith, as an exhibit, a warrant of attorney to confess judgment, the reviewing court will take notice of such warrant of attorney though not set out in the bill of exceptions.

2. JUDGMENT, § 17*—*when power of attorney to confess judgment on award of arbitrators invalid.* A power of attorney to confess judgment on a common-law award of arbitrators to be made after the execution of the power is invalid.

3. JUDGMENT, § 80*—*when judgment by confession may be vacated after expiration of term.* A court may vacate a judgment by confession after the expiration of the term at which it was rendered if it was without jurisdiction to enter the judgment.

4. JUDGMENT, § 13*—*when judgment by confession void.* A judgment by confession entered under an invalid power of attorney is void.

5. JUDGMENT, § 87*—*when suit dismissed upon vacation of void judgment.* Where, after vacation of a void judgment by confession, the plaintiff declined to take further proceedings, the suit may be dismissed.

Appeal from the Circuit Court of Henry county; the Hon. EMERY C. GRAVES, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916. *Certiorari* denied by Supreme Court (making opinion final).

STURTZ & EWAN and HARRY E. BROWN, *pro se*, for appellant.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CHARLES G. DAVIS and JOSEPH L. SHAW, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellant, Harry E. Brown, and appellee, W. B. Atwood, submitted to arbitration all controversies existing between them. The hearing March 26, 1913, resulted in an award in favor of the appellant and against appellee for the sum of $3,188.70. Appellant says, correctly we think, that it was not a proceeding under the statute, but was one at common law. The arbitration agreement was in writing and contained a provision: "That the award, when so made, may by either party be filed in the Circuit Court of Henry county, Illinois, and when so filed the said court is hereby authorized to enter judgment in favor of the party in whose favor said award may be made, without notice to either party hereto," followed by a warrant of attorney in the usual form used with promissory notes to confess judgment for such an amount as might be awarded. Afterwards appellant filed a declaration in the Circuit Court, counting on said award, and averring that the defendant had executed his power of attorney authorizing a confession of judgment thereon, setting out the legal effect of the award and attaching a copy of it to the declaration as an exhibit, expressly making the copy "a part of this declaration." Judgment by confession was entered in term time on this declaration. The exhibit so attempted to be made a part of the declaration included the arbitration agreement, the oath of the arbitrators, and their finding or award. Execution issued on the judgment so obtained. At a subsequent term, November 4, 1914, appellee appeared and entered a motion to vacate and set aside the judgment and quash the execution on the ground that the warrant of attorney attached to the declaration conferred no jurisdiction upon the court

to enter judgment against him, supported by his affidavit that the execution was served on him September 18, 1914, which was the first knowledge or notice he had that a judgment had been rendered or any proceeding commenced against him. Appellant moved to strike this motion from the files for the following reasons: That it comes too late, is vague and indefinite and does not point out wherein the warrant of attorney attached to the declaration fails to confer jurisdiction; that the affidavit of the defendant was sworn to before one of his attorneys of record; that the question raised by the motion is one of law, and the court has no jurisdiction to vacate said judgment after the term in which it was entered; that the defendant does not show any defense; that no equitable reason is presented for setting aside the judgment; that the defendant does not deny the debt; that the warrant of attorney gave the court jurisdiction of the person of the defendant and of the subject-matter of the suit; and the judgment can only be attacked for equitable reasons. The court heard the two motions together; denied appellant's motion and sustained appellee's motion to vacate the judgment and recall the execution; ordered that the judgment be set aside and vacated, and the execution quashed. Then the record recites that "The plaintiff, declining to proceed further in this suit, and the costs thereof having been paid, the suit is dismissed," from which judgment of the court this appeal was allowed and perfected, and a bill of exceptions signed showing the motion and affidavit of appellee, and the motion of appellant, above referred to, but not setting out the exhibit attempted to be made a part of the declaration.

It is claimed by appellee, and admitted by appellant in his reply brief, that because the arbitration agreement containing the power of attorney to confess judgment and other writings attempted to be made a part of the declaration as an exhibit are not preserved in the bill of exceptions that they are not before us for

consideration, and appellant urges that we must therefore assume that there was a valid power of attorney upon which the judgment was confessed. It does not appear in the body of the declaration that it is a suit upon an arbitration award which contained a warrant of attorney to confess judgment on the award to be rendered. Perhaps the reasonable assumption that such power of attorney was exercised in confessing this judgment is not warranted if we cannot take notice that the judgment was confessed by an attorney acting under that power.

There is an abundance of authority that it is not permissible to make exhibits a part of the pleadings at law, though it is a common practice in equity. In *Jones v. City of Chicago,* 167 Ill. App. 175, the court collected the Illinois authorities on that question. The cases there cited, most if not all of them, refer to copies of instruments sued on that are filed with the declaration under the statute requiring such copies to be filed. This court said in *Sehnert v. Schipper & Block,* 168 Ill. App. 245, "Common-law pleading cannot be done by exhibits," citing *Hart v. Tolman,* 6 Ill. (1 Gilm.) 1; *Thompson v. Kimball,* 55 Ill. App. 249; and *Chicago Portrait Co. v. Chicago Crayon Co.,* 118 Ill. App. 98, but held that the objection must be raised by special demurrer, and in the absence of such objection the exhibits, when by the language of the plea they are made a part of the pleadings, are to be treated as such. In the present case the exhibit is filed with the declaration and expressly made a part of the pleading, as was done in the *Sehnert* case, *supra.* We adhere to our holding in that case, and therefore take notice of the warrant of attorney on which the judgment was confessed in the present case. This presents the question whether a valid power of attorney can exist to confess judgment on an award not yet rendered in a common-law arbitration proceeding.

Appellee in his brief, at considerable length, shows

that the judgment cannot be maintained under the statute authorizing judgments in statutory arbitration proceedings. Appellant does not deny this, but says: "We are not concerned with the statute at all. The judgment in this case is justified under the common law." Judgment by confession cannot be entered upon an award unless the arbitration has been conducted under the statute and in compliance with its terms. *Duffy v. Odell,* 117 Ill. App. 336. There can be no valid warrant of attorney to confess judgment against the donor of the power where the amount of judgment is not fixed in the power. *Little v. Dyer,* 138 Ill. 272. There may be a valid warrant of attorney to confess judgment for rent to become due by the terms of the lease where the monthly rental is fixed by the lease, and the amount due is ascertainable by inspection of the lease, but not for the confession of judgment for other matters not ascertainable by an inspection of the lease. *Fortune v. Bartolomei,* 164 Ill. 51. Authority to confess a judgment without process must be clear and explicit and strictly pursued. A judgment so entered without such authority is a nullity. The judgment must be for a fixed and definite sum, and the facts supporting it must be established by the written documents required by the statute to be filed in order to authorize entry of a judgment by confession. *Weber v. Powers,* 213 Ill. 370.

We are of the opinion that there can be no valid power of attorney to confess judgment on a common-law award of arbitrators to be made after the attempted execution of the power. A court has the power to vacate a judgment after the expiration of the term at which it was rendered if it was without jurisdiction to enter the judgment. *City of Chicago v. Nodeck,* 202 Ill. 267, and authorities there cited.

It follows that the judgment entered by confession on the award was void, entered without authority, and

was properly vacated and set aside. After this action of the court the case was still there pending on the declaration filed. Appellant could, if he had seen fit, taken further proceedings, but as he declined to do so, the court did not err in dismissing the suit. Finding no error in the record the judgment is affirmed.

Affirmed.

George V. B. Weeks, Appellee, v. J. L. Jones, Appellant.

Gen. No. 6,204.

1. ATTORNEY AND CLIENT, § 134*—*when evidence as to good character of attorney incompetent in action for fees.* On the trial of an action of assumpsit for attorney's fees in the Circuit Court on appeal from the Justice's Court, testimony that the plaintiff's reputation for honesty and fair dealing was good, *held* incompetent, even though remarks attacking the plaintiff's reputation in that regard were made by the defendant's attorney in his opening statement, since such remarks are no part of the pleadings in such an action.

2. APPEAL AND ERROR, § 546*—*when evidence objected to and preserved for review considered on appeal.* Where admission of testimony is properly objected to and preserved for review, the ruling will be passed upon on appeal, although similar testimony is subsequently introduced without objection.

3. INSTRUCTIONS, § 153*—*when refusal to modify requested instructions not error.* A refusal of the trial court to modify bad requested instructions and give them as modified is not error.

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed February 8, 1916.

I. I. HANNA, for appellant.

GEORGE V. B. WEEKS, *pro se;* R. D. MILLS, of counsel, for appellee.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellee, George V. B. Weeks, a lawyer, sued appellant, J. L. Jones, before a justice of the peace for attorney's fees claimed to have been earned in his service. A trial in the Circuit Court on appeal resulted in a verdict and judgment for the plaintiff for $73. The defendant brings the record here for review. The evidence is conflicting, the conclusion to be drawn from the testimony largely depending upon which of the parties to the action is to be believed as a witness in statements where they directly contradict each other. We express no opinion as to the weight of the testimony. The plaintiff introduced as witnesses three lawyers. The first testified over the objection of the defendant that the plaintiff's "reputation here at this bar for honesty and fair dealing is good." The second that the plaintiff's "reputation is good in the community in which he lives for honesty and fair dealing." The third testified without objection that the plaintiff's "reputation in this community in the practice of his profession, as a reputable citizen, and a member of the bar for honesty and fair dealing is good." There can be no doubt that this testimony was incompetent. That the character of a party to a suit in assumpsit is not an issue hardly needs the citation of authority, but see Greenleaf on Evidence (15th Ed.) vol. 1, sec. 55. Appellee tries to sustain this ruling of the court by the statement that this is a justice proceeding, with no written pleadings; that we must assume there were oral pleadings, and as they have not been preserved in the bill of exceptions we should infer that there was some oral pleading justifying this evidence. The record shows that the evidence was offered because of the opening statement of counsel for defendant, but does not show what that statement was. Appellee's counsel in his brief says that appellant in his opening state-

ment of the case charged appellee with being dishonest and a shyster attorney of no standing in the community, and therefore this testimony was competent.

Section 19 of our Justice Act (J. & A. ¶ 6915) provides that "the justice shall, at the request of either party made before the trial shall have been entered upon, require the other to exhibit his account or state the nature of his demand or set-off in writing, and upon the trial may preclude the party failing to do so from giving evidence of the same or such part thereof as shall not have been exhibited or stated." Aside from this statute the law practically is that all proper pleadings are considered in, and any evidence should be received that would be admissible under proper pleadings if the case had been begun in a court of record. The statement suggested by the statute is usually not found in records presented here, and we assume in actual practice it is often not made. The statute only requires it on the request of the other party. The opening speech of counsel made on the trial is in no sense a pleading. It would lead to absurd results to treat every statement so made by counsel as presenting an issue on which proof could be introduced. We cannot presume that statements not shown in the record were made, and cannot imagine pleading proper or improper that would permit a court to stop in the trial of an ordinary assumpsit suit to hear evidence pro and con on the reputation of one of the parties to the action. After this character of testimony had been introduced over objection by two witnesses, the defendant permitted the third witness to testify without objection, but the question was nevertheless saved for our review (*Anglo-American Packing & Provision Co. v. Baier,* 20 Ill. App. 376; *Aetna Life Ins. Co. v. Paul,* 23 Ill. App. 611; *Taylor v. Pegram,* 151 Ill. 106); though the rule would be different if the testimony had been first admitted without objection and later testimony to

the same effect objected to. *People v. Nall,* 242 Ill. 284.

We find no other substantial error in the record. Counsel for appellant argues that the court erred in not modifying, and giving as modified, a bad instruction offered by him. It is not the duty of the court to amend or modify erroneous instructions, although he can do so if he sees fit. *Rolfe v. Rich,* 149 Ill. 436. The testimony of the three lawyers as to plaintiff's reputation above referred to must be presumed to have had weight in the minds of the jury in determining their verdict, and for that reason the judgment is reversed and the cause remanded.

Reversed and remanded.

City of Peoria, Appellee, v. Postal Telegraph-Cable Company, Appellant.

Gen. No. 6,207.

1. LICENSES, § 18*—*when evidence as to amount of business done by licensee admissible on question of reasonableness of fee.* In a nonjury action by a city to recover license fees for maintenance of telegraph poles in streets, *held* that evidence of the amount of business done by the defendant company should have been admitted on the question of reasonableness of the fee.

2. APPEAL AND ERROR, § 1491*—*when exclusion of evidence as to cost of supervision of telegraph poles in action by city against telegraph company for license fees not reversible error.* In a nonjury action by a city to recover license fees for maintenance of telegraph poles in streets, *held* that it was error, though not reversible error, to exclude evidence of the cost of supervision of such poles by the city.

3. LICENSES, § 18*—*when license fee imposed on telegraph company not unreasonable.* An annual license fee of $1 per pole for poles maintained by a telegraph company in streets and alleys, *held* not unreasonable, whether such fee be considered as such or as

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

rental, even though it were shown that the city incurred no expense in inspecting such poles except through its proper officers looking after all objects that might be so located.

4. LICENSES, § 1*—*when annual fee for maintenance of telegraph poles constitutes license fee.* An annual fee imposed by ordinance for maintenance of telegraph poles in city streets and alleys, *held* a license fee and not rental.

5. LICENSES, § 5*—*when city has power to impose reasonable license fee for maintenance of telegraph poles.* A city may, by ordinance, impose a reasonable annual license fee for maintenance of telegraph poles in streets and alleys, irrespective of whether or not it owns the fee of such streets and alleys.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

STEVENS, MILLER & ELLIOTT, for appellant; WILLIAM W. COOK, of counsel.

RICHARD H. RADLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal from a judgment of $242 for the plaintiff in a trial by the court without a jury of an action of debt brought by appellee, City of Peoria, against Postal Telegraph-Cable Company, the appellant, under an ordinance of the city, the section of which material to the consideration here reading:

"Section 1. That there shall be paid annually into the City Treasury a license fee of One Dollar ($1.00) for each post used for the support of telegraph wires and which occupies any portion of any public street, alley or sidewalk in the City of Peoria. The said sum shall be paid by the person or persons, or the corporation or corporations owning, using or occupying any such poles for the support of telegraph wires; and all persons or corporations so occupying any such pole shall be jointly and severally liable to the City of Peoria for the payment of such license fee."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The case is in many respects like that of *City of Springfield v. Postal Tel.-Cable Co.*, 164 Ill. App. 276, and 253 Ill. 346. In that case the ordinance in question expressly provided that the charge was made "as a remuneration to the said city for the use of the portion or portions of the street, alley or sidewalk which said pole or post may occupy." The right of the city to impose a reasonable charge in the nature of a rental for the exclusive use of the parts of the street occupied by the poles was affirmed. It was also said by the Supreme Court that similar charges may be imposed, not by way of rental, but in the exercise of police power in the nature of a license fee; but the Supreme Court held in that case that it was not a charge in the nature of a license fee but was a charge in the nature of a rental which the telegraph company was required to pay as a reasonable compensation for the use of the part of the streets and alleys occupied by the poles. Substantially the same defense is interposed in this case as in that of the acceptance by the defendant of the benefit of the Act of Congress of 1886 and subsequent acts; that the defendant was engaged in interstate commerce, and that the ordinance was an unlawful interference with interstate commerce and a tax levied upon one of the instrumentalities employed by the United States Government, with the other matters of defense as stated in the opinion of the Appellate Court in that case. If the ordinance in the present case is to be regarded as a rental ordinance, the *Springfield* case, *supra,* is conclusive that the defense grounded on Federal statutes is not available. If it is to be regarded as a license ordinance, the cases of *Western Union Tel. Co. v. New Hope Borough,* 187 U. S. 419, and *Atlantic & Pacific Tel. Co. v. City of Philadelphia,* 190 U. S. 160, are authority to the same effect. But whether it be regarded as a rental or license ordinance, it was a material question in this case whether it was reasonable. It

was held by the Supreme Court in the *Springfield* case, *supra*, that such ordinances are prima facie reasonable, and the burden of proof is upon those who assert the contrary. And it was held in the consideration of a similar rental ordinance in *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, that a reasonable charge would differ in different counties and locations but that it does not lie exclusively in the city's power to determine what a reasonable charge is; that the inquiry must be open to the courts and must depend largely upon matters not apparent upon the face of the ordinance, but existing only in the actual state of affairs of the city. And in consideration of a similar license ordinance the court held in *Western Union Tel. Co. v. New Hope Borough, supra,* that the ordinance could not be declared void as unreasonable unless the unreasonableness was so clearly apparent as to demonstrate an abuse of discretion on the part of the city, and suggested that it was the duty of the city to see that the poles were safe and properly maintained and that a liability against it existed if a citizen should be injured in person or property by reason of a neglect of such duty, therefore the measure of reasonableness of the charge should not be confined to the expense of supervising the defendant's work in the street. In *Atlantic & Pacific Tel. Co. v. City of Philadelphia, supra,* the ordinance was regarded as clearly a license as distinguished from a rental ordinance, and it was held proper for the enforcement of local governmental supervision; but it was said that the charge is authorized only in support of police supervision and the expense of such supervision determines the amount of the charge, and if it were possible to prove in advance the exact cost, that would be the limit of the tax. But as this is ordinarily impossible, the municipality is at liberty to make the charge large enough to cover any reasonably anticipated expense. The question of the reasonableness of the charge was held to be one of fact

for the jury to determine, and the judgment was reversed and the cause remanded because the trial court had refused to submit that question to the jury. The court did not conclude that the evidence showed the charge unreasonable, but only held that it was a question for the jury, and the trial court erred in not so treating it.

Appellant offered to prove the income and expense and charges of the defendant company for the year ending June 30, 1913, with the statement that the defendant wished to supplement the testimony by that of its Peoria, Illinois, manager and other testimony; offered to prove the receipts of the Peoria office, and the expense of operating and maintaining the Peoria office; that the defendant had paid the State tax; and asked a witness if there was any inspection by the City of Peoria of poles carrying telegraph wires different from inspection made of poles carrying other wires, and if any expense was incurred by the City of Peoria with reference to inspection of poles carrying telegraph wires in the year in question, and if the City of Peoria during the time in question had any employee employed for the purpose of making inspection of of poles which carried telegraph wires, and if there were carried on the poles in question wires of other companies. Objections to all these questions but the last were sustained on the ground that they were immaterial. The last question was permitted to be answered subject to the objection, and the witness replied that some of them did carry other wires.

We do not see how the inquiry as to how much business the defendant did in general or in detail could have much, if any, bearing on the question of the reasonableness of the ordinance. Still, as the trial was before the court without a jury, it would have been better to admit the testimony. But we think it clear under the authority of the cases before referred to that

the inquiry as to cost of supervision was material and that it was error to exclude that consideration. But assuming that the answer would have been that the city incurred no expense in supervising the defendant's work in the streets except through its proper officer looking after any and all objects that might be located there, we are still of the opinion that the court would not have been justified in holding the ordinance unreasonable and void. It is not clear from the authorities examined by us just what the scope of inquiry should be on the question of the reasonableness of such an ordinance, but if each of the questions to which the court sustained objections had been answered in manner most favorable to the defendant, the court should have refused to hold the ordinance unreasonable and this without regard to his determination of the question whether it was a rental or license ordinance.

The court held it a rental as distinguished from a license ordinance. We are not inclined to adopt that view but think it should rather be held a license ordinance which, under the authorities before cited, was within the power of the city to enact. Appellant claims that the city does not own the fee in a part of the streets on which the poles in question are located, because the plat of the portion of the city in which those streets lie shows a common-law dedication instead of a statutory dedication. We think the record sustains this claim. It is further argued if this is a rental ordinance the city, because of that fact, had no authority to require a rental to be paid. This is denied by appellee, but neither party furnishes any authority on that subject. If we are correct in our assumption that it is a license ordinance, we presume it is immaterial whether the city does or does not own the fee in the street. If it is a rental ordinance, the question whether the ownership of the fee in the street is material, and, if so, in what respect and how far to be distinguished

from cases where the city does own the fee, should be determined by some court after a careful and thorough investigation by counsel and citation of the authorities on that subject.

It is admitted that the defendant was using the number of poles indicated by the judgment. In our opinion the record discloses no reversible error, therefore the judgment is affirmed.

Affirmed.

MR. JUSTICE NIEHAUS took no part.

City of Peoria, Appellee, v. Western Union Telegraph Company, Appellant.

Gen. No. 6,208. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by City of Peoria, plaintiff, against Western Union Telegraph Company, defendant, of the same kind and character as *City of Peoria v. Postal Tel.-Cable Co.*, No. 6,207, *ante*, p. 218, in which practically the same questions were raised and argued. For the reasons stated in the opinion in that case, the judgment is affirmed.

STEVENS, MILLER & ELLIOTT, for appellant; FRANCIS N. WHITNEY, of counsel.

RICHARD H. RADLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Fred B. Shearer, Administrator, Appellee, v. Aurora, Elgin & Chicago Railroad Company, Appellant.

Gen. No. 6,093.

1. APPEAL AND ERROR, § 1411*—*when verdict based on conflicting evidence not disturbed.* Where the questions of defendant's negligence and of contributory negligence of the plaintiff are matters for the jury and the evidence thereon is conflicting, the Appellate Court will not interfere with the jury's findings thereon.

2. STREET RAILROADS, § 64*—*what degree of care required in operation of car upon approaching street crossing.* The operator of a street car is bound to exercise more care on approaching a street crossing than when running the car in the middle of a block.

3. STREET RAILROADS, § 86*—*when not liable for personal injuries arising from striking of wagon.* A street railway company is not liable for personal injuries resulting from one of its cars running into a wagon to which was attached a horse which had fallen on the track so close in front of the car that the motorman, in the exercise of proper care and management thereof, could not have avoided the collision, provided the car was not running at an excessive rate of speed.

4. STREET RAILROADS, § 133*—*when question of excessiveness of speed of car for jury.* Where the evidence, as to whether the defendant's motorman was running his car at an excessive rate of speed, was in conflict, *held* that the question was properly submitted to the jury.

5. EVIDENCE, § 444*—*when testimony of attending physician concerning subjective symptoms of injured patient admissible.* Testimony of an attending physician concerning the subjective symtoms of the plaintiff, by whom he was called in, not for the purpose of procuring his testimony on the trial but for the sole purpose of procuring treatment, which treatment was based upon the diagnosis so made, *held* admissible, though such testimony related to a time four months after the injuries were received.

6. EVIDENCE, § 423*—*when physician may state opinion whether physical condition was result of accident.* Where, in a personal injury action, there is no dispute as to the manner in which the injuries were received or the means by which they were inflicted, the plaintiff's attending physician may state his opinion as to whether the plaintiff's physical condition at the time he made a diagnois was the result of the accident.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

7. EVIDENCE, § 368*—*when nonexpert witnesses may state opinions as to physical condition.* In an action for personal injuries, nonexpert witnesses, who were acquainted with and worked with the plaintiff before and after the infliction of the injuries, may state their opinions as to his physical condition after the infliction of such injuries.

8. DAMAGES, § 162*—*when allegation in declaration sufficient as basis for proof of loss of earning power.* In an action for personal injuries, under an allegation of the declaration that the plaintiff "became and was, by reason of his injuries sick, sore, lame and disordered, and suffered severe and permanent injuries to his body and limbs; and that his ligaments, bones and muscles were severely wrenched, broken and torn; and that he received other severe and permanent injury in his back and hips," is sufficient as a basis for proof of loss of earning power, in wages, since that was a necessary or natural result of such a condition.

9. TRIAL, § 91*—*when objection to evidence not sufficiently specific.* In an action for personal injuries, an objection that evidence as to loss of wages is "incompetent and immaterial under the pleadings in the case," without pointing out to the trial court the absence from the declaration of an allegation specifically covering damages on account of loss of wages, is not sufficiently specific, and an error assigned on the admission of such evidence will not be considered on appeal.

10. APPEAL AND ERROR, § 1561*—*when refusal to give requested instructions not reversible error.* Where correct instructions given on the trial of a case cover all the law involved, a refusal to give instructions requested by a party, though they contain correct propositions of law applicable to the case, is not reversible error.

11. DAMAGES, § 115*—*when verdict not excessive.* A verdict for $1,200 for injuries sustained by a plasterer by being knocked off a wagon by a street car, *held* not excessive.

Appeal from the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916. *Certiorari* denied by Supreme Court (making opinion final).

DAVID J. PEFFERS and ROBERT J. WING, for appellant.

FRED B. SHEARER, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an action on the case, brought in the City

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Court of Aurora, in Kane county, by William J. Nelson in his lifetime, against the Aurora, Elgin & Chicago Railroad Company, appellant, to recover damages for personal injuries claimed to have been suffered by him as the result of a collision, by which one of appellant's street cars came in contact with a wagon in which Nelson was riding, when crossing the street car tracks of appellant's car line at the intersection of Walnut and North Lake streets in the City of Aurora. After suit was instituted, Nelson died from other causes, and the administrator of his estate, Fred B. Shearer, was substituted as party plaintiff, and is the appellee herein.

The ground for recovery charged in the declaration is that appellant's servants carelessly and negligently drove the street car in question, and at an exceedingly high rate of speed, and that this was the cause of the collision. One count of the declaration also charges that the collision was the result of wilful negligence on the part of appellant's servants. There was a trial by jury, which resulted in a verdict for the plaintiff, fixing damages in the sum of $1,200, upon which the court rendered judgment, and from this judgment, the appeal is taken.

The appellant operates a street car line along North Lake street, in the City of Aurora, and the collision occurred at the point where the car line crosses Walnut street. The proof shows that Nelson was a plasterer; and at the time in question, in company with two fellow employees, and John Probert, his employer, was riding in a wagon drawn by a single horse, and driven by William Bliss, one of Probert's employees, who sat on the right-hand side of the seat, Nelson sitting on the left-hand side, and the other two men standing in the wagon, in the rear of the seat; that they were in the act of crossing the street car tracks, at the crossing, and had nearly crossed the tracks, when the horse which was drawing the vehicle suddenly fell down; and

the street car, which it is claimed was running at a high rate of speed and not managed as carefully as it should have been, when approaching the crossing, thereby came into violent contact with the wagon, throwing Nelson on the pavement.

It is claimed by appellant that the verdict is against the weight of the evidence, upon the question of the negligence charged; and there is a conflict of evidence upon that question, as well as upon the question as to whether the parties in the wagon were themselves in the exercise of due care in crossing the street car tracks, at the time they did; but these being disputed questions of fact, it was peculiarly the province of the jury to pass upon and determine them; and this court cannot say that the jury did not rightly determine them, in deciding in favor of the appellee; or that they should have decided these questions of fact in favor of the contention of appellant. There is evidence tending to show that appellant's street car was running at a higher rate of speed than would be justified by the requirements of due care, in approaching a crossing where vehicles and people are liable to cross at any time, and the court therefore properly refused the peremptory instruction requested by appellant. It is well-settled law that the operator of a street car is bound to exercise more care on approaching a street crossing than when running the car in the middle of a block, because he must anticipate the legitimate use of the crossing by vehicles and persons. (*Savage v. Chicago & J. Ry. Co.*, 142 Ill. App. 342.)

The evidence shows that the horse which was drawing the wagon in question fell just before the car reached the crossing. If the car was not running at an excessive rate of speed, when the horse fell, and was so close that the motorman, in the exercise of proper care, in the management of the car, could not have stopped the car in time to avoid the collision, then the

appellant would not be liable; but it is upon this very point that the evidence is in conflict, and therefore was properly submitted to the fair judgment of the jury. *Guerdon v. Corbett,* 87 Ill. 274.

Various errors are assigned, with reference to the admission of what is claimed to be improper evidence, and also concerning the giving or refusal, and the modification, of certain instructions. Appellant insists that the court erred in admitting the medical testimony of Dr. Prichard, about the subjective symptoms of Nelson's injuries, on the ground that these involved bringing to the attention of the jury what are termed self-serving declarations made by Nelson, four months after the injuries were received. It is clear, however, that Dr. Prichard was Nelson's attending physician, whom he called in, not for the purpose of procuring his testimony upon the trial of this case, but for the purpose only of procuring from him treatment for the physical injuries from which he was suffering; and that the doctor made the diagnosis of the case in order to give him proper treatment; and that he did afterwards treat him in conformity with the diagnosis made. The testimony of a physician concerning the subjective symptoms manifested is competent under these circumstances. *Stout v. Taylor,* 168 Ill. App. 410.

Objection is also made because the doctor was allowed to express an opinion as to whether the physical condition in which he found Nelson was the result of injuries which he had received in the collision. This evidence was competent, inasmuch as there was no dispute as to the manner in which Nelson had received his injuries, or the means by which he had received them. It was practically conceded that as a result of the collision he was thrown from the wagon onto the pavement, and that the fall was so severe that a portion of his back was bruised and became inflamed and swollen in consequence. "Where there is no conflict

in the evidence as to the manner of receiving the injury, or the means by which the injury is inflicted, it is competent for the physician to testify whether, in his opinion, the damage which he finds was caused by reason of the injury received." *Hoxsey v. St. Louis & S. Ry. Co.*, 171 Ill. App. 76; *Donnelly v. Chicago City Ry. Co.*, 235 Ill. 35; *City of Chicago v. Didier*, 227 Ill. 571; *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481; *Village of Chatsworth v. Rowe*, 166 Ill. 114; *West Chicago St. Ry. Co. v. Dougherty*, 209 Ill. 241. We do not think that the decision in the *Schlauder* case, 253 Ill. 155, is in conflict with the views here expressed.

The evidence concerning Nelson's physical condition after the accident, which could be judged by observation, by witnesses who were acquainted with him and who worked with him, before and after the accident, we think was competent. It is not necessary that a witness should be an expert to express an opinion as to the apparent physical condition of a person whom he has observed; and it is proper to allow such witness to state whether, in his opinion, such person is in good health; has ability to perform work; or whether he is suffering pain, or is conscious or unconscious; or is in the possession of his mental faculties. *Greinke v. Chicago City Ry. Co.*, 234 Ill. 564; *West Chicago St. Ry. Co. v. Fishman*, 169 Ill. 196; *Cicero & P. St. Ry. Co. v. Priest*, 190 Ill. 592; *Chicago & E. I. R. Co. v. Randolph*, 199 Ill. 126; *Lauth v. Chicago Union Traction Co.*, 244 Ill. 244.

Nor was the evidence of the wages earned by Nelson, before and after receiving the injuries in question, incompetent. The fact that he could not earn as much after the injuries, on account of his physical condition, was clearly evidence of the fact that his physical condition was impaired; and the general allegations in the declaration that Nelson "became and was, by reason of his injuries sick, sore, lame and disordered, and suf-

fered severe and permanent injuries to his body and limbs; and that his ligaments, bones and muscles were severely wrenched, broken and torn; and that he received other severe and permanent injury in his back and hips," was sufficient as a basis for proof of the loss of his earning power, in wages, because it was a necessary or natural result of such a condition. What the court said in the case of *Chicago City Ry. Co. v. Hastings*, 136 Ill. 251, is pertinent to the point now under discussion, viz.: "The declaration set out the injury received, and the evidence established the extent and character of the injury; and while the evidence may not have shown the exact number of days lost by plaintiff, it showed the fact that plaintiff was disabled and unable to pursue his usual business, and from these facts loss of time was so far established that the jury might properly take that into consideration in estimating the damages sustained." The averment in the declaration in that case, upon which the evidence of loss of time and wages was admitted, was that in consequence of such injuries the plaintiff had been "sick and languishing from thence hitherto; that in consequence of such injuries, he had become permanently crippled."

But it is sufficient to say, in reference to this assignment of error, that the only objection made to the evidence, when offered, was that it was "incompetent and immaterial under the pleadings in the case." This objection was not sufficiently specific because it did not specially call the court's attention to the fact that there was no allegation in the declaration to specifically cover damages on account of loss in wages. The specific objection, that there was no allegation in the declaration to cover loss of wages, was made, for the first time, in this court, and therefore of no avail. *Prussing v. Jackson*, 85 Ill. App. 324.

The instructions given by the court fully covered the

propositions of law involved in the case; those given for the appellant amply state all the legal propositions it was entitled to have urged upon the attention of the jury; and there was no substantial error in the modifications of instructions made by the court. The language of the Supreme Court in *George H. Hess Co. v. Dawson,* appears peculiarly applicable to this phase of appellant's contention: "The instruction which the court gave to the jury contained substantially all the law involved in the case, and although the instructions prepared by the defendant may, some of them, contain correct propositions, no necessity existed for giving them to the jury." *George H. Hess Co. v. Dawson,* 149 Ill. 145.

It is also urged that the verdict is excessive, but the evidence strongly tends to show that Nelson's injuries were quite serious; that they left Nelson in a defective physical condition and caused him considerable pain and suffering, as well as loss of earning power and wages. The damages cannot justly be regarded as excessive.

There being no reversible error in the case, the judgment should be affirmed.

Affirmed.

Aurora Trust & Savings Bank, Appellant, v. Matt Fidler, Appellee.

Gen. No. 6,100.

1. INSTRUCTIONS, § 31*—*when court may instruct orally as to verdict.* It is not competent for a court to instruct a jury orally, concerning the verdict they should render, except in relation to matters that pertain strictly to the form of the verdict, or to a correction of the form thereof.

2. INSTRUCTIONS, § 31*—*when oral instruction erroneous as being on matter of substance and not of form of verdict.* Where, in an action on a promissory note to which the general issue and partial payment were pleaded, the jury returned a verdict: "We, the jury, find the issues for the defendant and assess the plaintiff's damages at the sum of $1,049.42," an oral instruction that the jury should deduct such amount from the amount of the note and return a verdict for the plaintiff for the difference, *held* erroneous as an oral instruction on a matter of substance and not of form of the verdict, and also as amounting to directing a verdict.

3. INSTRUCTIONS, § 28*—*when giving of oral instructions reversible error.* It is reversible error for a trial court to orally instruct a jury concerning the law of the case, or to orally qualify or explain a given written instruction.

4. INSTRUCTIONS, § 31*—*when oral instruction as to method in arriving at amount of verdict error.* It is error for a court to orally instruct a jury as to the method they are to pursue in arriving at the amount of a verdict.

5. INSTRUCTIONS, § 46*—*when improper as invading province of jury.* Where the evidence is conflicting it is error for the court to assume, in an instruction, that a verdict will or should be returned for any particular sum or any particular party.

6. TRIAL, § 260*—*when court may not reconcile self-contradictory verdict with supposed facts.* Where the real findings of the jury are conjectural, a court may not reconcile a self-contradictory verdict with what he believes the findings to have been.

Appeal from the City Court of Aurora; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed February 8, 1916.

LEE MIGHELL, HARVEY GUNSUL and OLNEY ALLEN, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

JOHN S. SEARS and ROY J. SOLFISBURG, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case, a judgment was first entered by confession in the City Court of Aurora, on a judgment note made by Matt Fidler, the appellee, in favor of the Aurora Trust & Savings Bank, appellant, for the sum of $3,026.30. Afterwards, on motion of the appellee, the judgment was reopened, to allow appellee to plead in defense, and he pleaded the general issue, and a special plea averring partial payment of the note. The case was tried by a jury, upon issues joined on appellee's pleas. The jury first returned the following verdict: "We, the jury, find the issues for the defendant and assess the plaintiff's damages at the sum of $1,049.02."

After the return of this verdict into court, the following colloquy occurred between the court and counsel and a juror:

"THE COURT: Now, gentlemen, I will have to send you back again because you got confused on this instruction. What we wanted you to do in there was, if you find for the defendant, that means if you find that the defendant was entitled to that credit, then you assess the plaintiff's damages whatever he was entitled to less that credit. Instead of that, you put in there what the defendant was entitled to. What we want to know is what the plaintiff is entitled to, after taking away what the defendant is entitled to. The thing to do is to take and figure up the amount of that note as you are directed to on this first instruction, if you remember the testimony of the young bank fellow as to what his figures—what he said was due on the note.

"JUROR: $3,157.13.

"THE COURT: Then you take that figure at the outset and deduct this amount that you find for the de-

fendant, Matthew Fidler, and then you will have it right. Here I am going to let you go back and fix that. You will get a new blank for it. You can take this one with you so you can keep your figures in mind. I do not know whether that is the figure or not.

"JUROR: I think that was, to the best of my knowledge.

"THE COURT: Have you got my idea now?

"JUROR: I think we have.

"THE COURT: As I understand you, you found in here what the defendant was entitled to as a credit on that note?

"JUROR: Yes, sir.

"THE COURT: Right up to date?

"JUROR: Yes, sir.

"THE COURT: Now then, in order to find what the plaintiff is entitled to, after giving the defendant that, you figure it up to date as you are instructed in these instructions, at a stated rate of per cent., and deduct this amount from that amount, and what is left is what the plaintiff would be entitled to on your findings here. Have you got it right now? If there is any question about it, tell me now.

"JUROR: I think we can get it right now. I think we had the substance of it."

Thereupon the jury again retired, and then returned another verdict, which is as follows: "We, the jury, find the issues for the defendant and assess the plaintiff's damages at the sum of Two Thousand One Hundred Three Dollars and Seventy-eight Cents."

If it were apparent that the foregoing proceedings concerned or affected merely the form of the verdict to be framed by the jury, there would not be sufficient ground in them for reversal of the judgment. (*Brown v. Rounsavell*, 78 Ill. 594.) But it will be noticed that the form of the second verdict is exactly like the first; the change made was a change in the amount of the plaintiff's damages, which the jury assessed, in the

first verdict, at $1,049.02, and in the second verdict at $2,103.78. Evidently the correction made in the verdict related to matters of substance, and not mere matters of form; and it is evident that the instructions which the court gave the jury orally had the direct effect of causing the jury to bring in a verdict which was very different concerning matters of substance, and exactly the same in matters of form. It is not competent for a court to instruct a jury orally, concerning the verdict they should render, except in relation to matters that pertain strictly to the form of the verdict, or to a correction of the form of a verdict. (*Illinois Cent. R. Co. v. Wheeler,* 149 Ill. 525.)

By its oral instructions, the court sought to correct the first verdict which was returned by the jury, concerning the matters which were in controversy, especially referring to the application of a partial payment, which appellee claimed was made upon the note in question, which, however, was denied by appellant, and which was one of the substantial issues to be decided by the jury from the evidence; and, in this connection, the court said to the jury: "The thing to do is to take and figure up the amount of that note as you are directed to on this first instruction, if you remember the testimony of the young bank fellow as to what his figures—what he said was due on the note. * * * Then you take that figure at the outset and deduct this amount that you find for the defendant, Matthew Fidler, and then you will have it right. Here I am going to let you go back and fix that."

This instruction practically directed a verdict, on a controverted question, and the court assumed, for that purpose, that the jury had decided the issue concerning the application of a partial payment made in favor of appellee. This oral instruction was, therefore, prejudicial to the rights of the appellant. It is reversible error for the trial court to orally instruct a jury

concerning the law of a case, or to orally qualify or explain written instructions which have been given. (*Ray v. Wooters*, 19 Ill. 82; *Hefling v. Van Zandt*, 162 Ill. 162; *Jarnecke v. Chicago Consol. Traction Co.*, 150 Ill. App. 248; *City of Abingdon v. Meadows*, 28 Ill. App. 442; *Ellis v. People*, 159 Ill. 337.)

And to instruct a jury orally as to the method which they are to pursue in arriving at the amount of a verdict is error. (*Illinois Cent. R. Co. v. Hammer*, 85 Ill. 526.) Where the evidence is conflicting, it is error for the court to assume, in an instruction, that a verdict will or should be returned for any particular sum or any particular party. (*Hawk v. Ridgway*, 33 Ill. 473.)

Both verdicts which the jury returned were apparently contradictory in terms, and had a double meaning; that is to say, the jury in both verdicts found the issues in the case for the appellee, and yet assessed damages for the appellant. The issues in the case were, first, the general issue, which in effect denied the whole of plaintiff's claim, and its right to recover anything; and the other issue was raised by the plea of partial payment, which denied the appellant's right to recover a part of the note sued on, namely, that part which appellee claimed was liquidated by having directed that the amount of a certain certificate of deposit be applied as a credit on the note. If the jury really found both of the issues in favor of the appellee, then the appellant was not entitled to recover any damages. Inasmuch as the verdict was contradictory and double in its meaning, it would have been entirely proper to have given the jury an additional instruction in writing, in relation to the matter that appeared to be in confusion, and allow them to make their verdict accord with the real conclusions of the jury. The court was not in position to reconcile the verdict returned with what may have been the true findings of the jury, except by guessing at it; and it really left

the true meaning of the verdict a matter of conjecture. Such a verdict, if allowed to stand, necessarily results in a mistrial. (*Levy v. Beckman Pub. Co.*, 65 Hun 619, 19 N. Y. Supp. 751.)

For the errors indicated, the judgment must be reversed and the cause remanded for another trial.

Reversed and remanded.

The People of the State of Illinois ex rel. G. A. Morrison and Robert Simpson, Appellees, v. Henry Schwiesow et al., Appellants.

Gen. No. 6,106.

1. ROADS AND BRIDGES, § 54*—*when petition to lay out new road contains sufficient number of signatures by landowners.* A petition to lay out a new road, under Rev. St. 1913, ch. 121, sec. 75 [Cal. Ill. St. Supp. 1916, ¶ 10000 (75)], which is signed by sixteen landowners residing in the township or road district within two miles of the road to be laid out, is sufficient even though they could not constitute two-thirds of the landowners in the township residing within such distance, as the provisions of the statute are alternative.

2. ROADS AND BRIDGES, § 54*—*when petition to lay out new road shows qualification of petitioners.* A petition to lay out a new road under Rev. St. 1913, ch. 121, sec. 75 [Cal. Ill. St. Supp. 1916, ¶ 10000 (75)], sufficiently shows the qualification of the petitioners where it appears merely from the recitals thereof that they are qualified.

3. ROADS AND BRIDGES, § 55*—*when description of proposed new road in petition for sufficient.* Where the description of a proposed new road in a petition therefor under Rev. St. 1913, ch. 121, sec. 75 [Cal. Ill. St. Supp. 1916, ¶ 10000 (75)] is reasonably certain, it is sufficient.

4. ROADS AND BRIDGES, § 54*—*when petition for new road sufficiently shows names of owners of lands over which it will pass.* A petition for a proposed new road under Rev. St. 1913, ch. 121,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

sec. 75 [Cal. Ill. St. Supp. 1916, ¶ 10000 (75)], which states that "said proposed road is projected across the land of the following landowners," and gives the names of such landowners, is sufficient.

5. ROADS AND BRIDGES, § 54*—*when questions of vacating of old road and laying out of new need not be included in same petition.* Under the Roads and Bridges Act, ch. 121, sec. 75 [Cal. Ill. St. Supp. 1916, ¶ 10000 (75)], it is not necessary, although proper, that the questions of the vacating of an old road and the laying out of a new road, even where each is a part of a general plan of improvement to be carried out, be included in one petition to the commissioners of highways.

6. ROADS AND BRIDGES, § 53*—*when petition for vacation of old road and for establishment of new may be considered together.* A petition for the vacating of an old road and one for the laying out of a new road may be contemporaneously considered, and the projects proposed may be carried out simultaneously as part of the same general enterprise.

7. COSTS, § 30*—*when highway commissioners denying petition to vacate old road and to establish new road not personally liable for costs.* Where highway commissioners act in good faith in denying petition to vacate an old road and to lay out a new one, they are not individually liable for costs in mandamus proceedings, to compel their further action in compliance with law, upon judgment going against them.

Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed February 8, 1916.

BARR, MCNAUGHTON & BARR, for appellants.

COWING & KING, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case, the People of the State of Illinois, *ex rel.* G. A. Morrison and Robert Simpson, appellees, filed a petition for mandamus, in the Circuit Court of Will county, against Henry Schwiesow, John Kahn, William H. Bisping and Victor Buetin, as Commissioners of Highways of the Township of Peotone, in Will

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

county, to compel appellants, as commissioners of highways, to fix a time and place to examine the route of a road, described in a petition filed in the office of the town clerk; and which road was projected across Section 20, in the Township of Peotone, along the north and south center line of the west half of said section, running from the road on the north of the section line, south to the road on the south line of the section; also to fix a time for hearing the reasons for and against the vacating of a road, as proposed by another petition, also filed in the office of the town clerk, and to fix a time and place to examine the route of a proposed new road, and to hear reasons for or against the laying out of the new road proposed in the petition; and to give notice of the times and places of such examinations and hearings, by posting proper notices in the vicinity of the proposed new road, and the road to be vacated, as required by the statute; and to proceed in conformity with the statute concerning the matters embraced in the respective petitions.

The petition for mandamus, as first filed, was amended, and the appellants interposed a general demurrer to the amended petition. The court overruled the demurrer, and appellants decided to stand by their demurrer, whereupon a judgment was entered, taking the facts as alleged in the petition for mandamus, as confessed by the demurrer, and ordering a peremptory writ of mandamus in conformity with the prayer of the amended petition; also entering judgment for costs against appellants, as commissioners, and dismissing the suit as to John Kahn, who had ceased to be one of such commissioners. An appeal was taken from this judgment to this court.

It is urged by appellants that the appellees were not entitled to the writ of mandamus, because the petition to lay out a new road as well as the petition to vacate the old road did not meet the requirements of the statute; that it does not appear from the recitals in the pe-

titions for either the new road or the vacating of the old road that the petitioners constituted two-thirds of the landowners residing within the township, within two miles of the proposed new road, or within two miles of the road sought to be vacated; and that the description of the proposed new road, in the petition, is not reasonably certain; further, that the petition for the proposed new road does not purport to give the names of the owners of the lands over which the road is to pass; also, that it is not averred in the amended petition for mandamus that the petitioners applying for the vacation of the old road or for the establishment of the new road had the required qualifications to sign the same. It is also claimed by appellants that the petition to vacate the old road and the petition to lay out the new road should have been included in the same application, each being a part of the same improvement.

As to the first assignment of error, namely, that two-thirds of the landowners residing in the township within two miles of the proposed new road, or the one sought to be vacated, did not sign such petition, it may be said that the requirements of the statute under which the petitions were drawn are in the alternative; and that while two-thirds of the landowners residing in the township may make such petition, the present statute also grants such right of petition to any number of landowners residing in any town or road district, within two miles of the road to be altered, widened, vacated or laid out. Section 75, chap. 121, Revised Statutes of 1913. [Cal. Ill. St. Supp. 1916, ¶ 10000 (75).] In this case, the number of landowners petitioning is sixteen, which number is more than required in the alternative clause of the statute referred to.

The petition in this case by the People of the State of Illinois is made on the relation of G. A. Morrison and Robert Simpson, who appear on the face of the petition to be two of sixteen landowners, residing within

two miles of the road in question, in the Township of Peotone, and who signed both the petitions for the vacation of the old road and the laying out of the new road. The qualification of the relators as petitioners is therefore apparent from the recitals on the face of the petition. It is not necessary to expressly state facts in the petition to show that those signing the petition were qualified to sign. *Highway Com'rs Town of Afton v. Ellwood,* 193 Ill. 304. All that is required is that the qualification shall appear in the recitals in the petition. 15 Am. & Eng. Encyc. of Law (2nd Ed.) 362; Elliott on Roads and Streets, 296. The description of the road to be laid out is reasonably certain, and therefore sufficient.

It was pointed out by the Supreme Court, in the case of *Henline v. People,* 81 Ill. 272, that: "It was not designed that the petitioners should have the proposed route surveyed, and that the line and every point on the route and at the ends of the route should be inserted in the petition. The proceeding was intended to be practical, so that the common highways of the country might be established without the employment of a corps of scientific men for the purpose, but that the roads might be established by ordinary, practical business men."

The objection that the petition for the proposed new road does not purport to give the names of the owners of the lands over which the road is to pass is also untenable, for the petition states that "said proposed road is projected across the land of the following landowners," giving the names of such landowners. The plain and inevitable inference from the language is that the parties named are owners of the land across which the new road is to be laid out, and therefore sufficient to meet the requirements of the statute. The Roads and Bridges Act referred to does not require that the vacating of an old road and the laying out of

a new road, even where each is a part of a general plan of improvement to be carried out, must be included in one petition; while it would be perfectly proper to include both projects in one petition, it is not necessary to do so. *Brown v. Roberts,* 23 Ill. App. 461; *Anderson v. Wood,* 80 Ill. 19. Moreover, there is nothing in the law which precludes a contemporaneous consideration of both petitions, nor a carrying out of the projects proposed, simultaneously, as parts of the same general plan or enterprise. It is apparent, therefore, that the amended petition for mandamus was not subject to the legal objections raised by the demurrer. The demurrer was properly overruled, and the petition for mandamus, taken as confessed, presented all the necessary facts to show that the appellee was entitled to the peremptory writ of mandamus which the court awarded.

Concerning the judgment for costs, it may be said that the appellants acted in their official and representative capacity; whatever they did, or failed to do, and nothing appears in the record which indicates that they did not act in perfect good faith to do or not to do what they believed to be their duty or right in the matter. It would not have been legally proper, under these circumstances, to have assessed the costs against the appellants individually. *McKay v. Riley,* 135 Ill. 586.

There is no error in the record, and the judgment awarding the writ of mandamus should therefore be affirmed.

Affirmed.

MR. PRESIDING JUSTICE DIBELL took no part.

John H. Gibson, Appellee, v. Frank L. Pitney, Appellant.

Gen. No. 6,109. (Not to be reported in full.)

Appeal from the City Court of Sterling; the Hon. WILLIAM A. BLODGETT, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed February 8, 1916. Rehearing denied April 6, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by John H. Gibson, plaintiff, against Frank L. Pitney, defendant, to recover the amount of advance payments upon a contract for the purchase of real estate, after alleged breach by defendant in failing to give possession. From a judgment for plaintiff, defendant appeals.

Defendant entered into a written contract with plaintiff on the 25th of June, 1913, by which the defendant agreed to convey to the plaintiff, by warranty deed, a farm, with a dwelling house thereon, in the county of Whiteside, in consideration of the payment by plaintiff of $18,000 as follows: $200 cash in hand; $1,100 in a note made by J. W. McCready, to be indorsed over to defendant; and the balance of the consideration to be settled by plaintiff at the time of the delivery of the deed to him, on March 1, 1914, by making a further payment of $3,700 and by giving another mortgage on the premises for $4,975, with interest at five per cent. per annum. It was expressly agreed in the contract that defendant would deliver to plaintiff a warranty deed, and give him possession of the premises on March 1, 1914, the premises to be in as good condition as they were at the date of the contract, ordinary wear and tear excepted.

At about the date fixed by the contract for the delivery of the deed and the possession, plaintiff went to

defendant, who was cashier of the First National Bank at Sterling, Illinois, and demanded of defendant that he carry out the terms of the contract, by delivering to him the deed and the possession of the premises; and offered to perform his part of the contract by paying the $3,700 which he had drawn from the Sterling National Bank, and had in his possession for that purpose, and by delivering to defendant the notes and mortgage for the settlement of $4,975, as required by the terms of the contract. The evidence showed that defendant was ready to deliver the warranty deed, but practically admitted that he could not carry out his agreement in regard to giving plaintiff possession; and it appeared from his own testimony that he proposed to obtain for plaintiff some other dwelling house to occupy until he could put him in possession of the dwelling house on the premises in question, which offer plaintiff refused to accept; and thereupon the plaintiff declared the contract at an end, and demanded a return of the part of the consideration which had been paid to defendant. Defendant refused, and plaintiff commenced this suit to recover the sum paid.

It was urged by the defendant that under the facts presented in evidence, plaintiff had no right to recover, and that the evidence failed to show that plaintiff tendered performance on his part, or a willingness and ability to perform, or that the actual performance of this contract, which was mutual in its character, was prevented by the defendant. There was evidence tending to show that the premises were not in as good condition at the time of the making of the contract; that the dwelling house was quarantined, owing to the presence of smallpox; that water pipes had been frozen and were bursted, and had dampened some of the plastered walls of the house, and had caused some of the plastering to fall; and that because of the bursting of the water pipes there were several feet of water

in the cellar or basement of the house, which made it very insanitary.

H. H. WAITE and N. G. VAN SANT, for appellant.

H. C. WARD, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. VENDOR AND PURCHASER, § 336*—*when evidence sufficient to show that purchaser offered in good faith and was able to perform contract.* In an action by a purchaser of land to recover the amount of payments made upon failure of the vendor to give possession, evidence *held* sufficient to sustain a finding that the purchaser offered in good faith to perform the contract and was able, at the time, to perform it.

2. VENDOR AND PURCHASER, § 96*—*when purchaser may rescind contract.* The time fixed for performance of a contract is deemed the essence of the contract, and generally, if the seller of real estate is not able and ready to perform his part of the agreement on the day, the purchaser may elect to consider the contract at an end.

3. VENDOR AND PURCHASER, § 336*—*when evidence sufficient to sustain finding that vendor unable to perform contract at date for performance.* In an action by the purchaser of real property to recover advance payments upon failure of the vendor to give possession on the date stipulated in the contract, evidence *held* sufficient to sustain a finding that the vendor was unable to give possession of the premises in good condition on the day stipulated in the contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Anna Koepke, Administratrix, Appellee, v. Chicago, Rock Island & Pacific Railway Company, Appellant.

Gen. No. 6,128. (Not to be reported in full.)

Appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed February 8, 1916.

Statement of the Case.

Action by Anna Koepke, as administratrix of the estate of her husband, Herman Koepke, plaintiff, against the Chicago, Rock Island & Pacific Railway Company, defendant, to recover damages for the death of the husband. From a judgment for plaintiff for $7,200, defendant appeals.

It was alleged in the declaration that the deceased was killed while engaged as car inspector's helper, in the line of his duty, by the negligence of defendant's servants, and the liability of defendant was based upon the provisions of the Federal act relating to the liability of common carriers engaged in interstate business to their employees.

The negligence charged was that the defendant, by its servants, negligently managed a switch engine and the switching which was done by defendant's servants in connection with the distribution of a string of cars, around some of which the deceased was employed; that defendant's servants, who were managing the switching and the switch engine at the time in question, did not exercise reasonable care to ascertain whether the deceased was endangered by their work, nor give him any warning of the danger incurred, and that defendant's servants negligently failed to set the brakes of the string of cars in question, and that thereby such

cars got into motion, unexpectedly, and ran into the deceased.

There was a trial by jury, which resulted in a verdict finding the defendant guilty and assessing the damages in the sum of $7,200, and the damages were apportioned equally between Anna Koepke, the widow, and Helen Koepke, the only child of the deceased. The jury made a special finding to the effect that the total amount of damages suffered was $8,000, and they deducted $800 therefrom for contributory negligence of which they found the deceased guilty. Judgment was rendered on the verdict and, upon appeal, it was attacked principally on the ground that the cause of the death of plaintiff's intestate was a part of the risk and danger assumed by him, by his contract of employment; that the damages were excessive, and that the jury, who found that the plaintiff's intestate was guilty of contributory negligence, did not deduct a sufficiently large proportion from the whole amount of damages found, on account of such contributory negligence.

JACKSON, HURST & STAFFORD, for appellant; M. L. BELL and A. B. ENOCH, of counsel.

SEARLE & MARSHALL, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 693*—*when evidence sufficient to show that cars striking car repairer at work in front of detached car were pushed with unusual violence.* In an action under the Federal Employers' Liability Act for the negligent death of an assistant car repairer who was caught between the buffer of a standing mail car which had been detached from the train by a road engine and which he was inspecting, and the buffer of the foremost car

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of the rest of the train upon which a switch engine was working at the other end to "cut off" two coaches, evidence *held* sufficient to sustain a finding that the switch engine bumped against the standing cars, during the operation of cutting off such coaches, with such violence and unusual force as to cause the string of cars to move to the place where decedent was working.

2. MASTER AND SERVANT, § 337*—*what risks employee does not assume.* An employee assumes only the ordinary risks and dangers of his employment and does not assume extraordinary or unusual risks thereof.

3. MASTER AND SERVANT, § 337*—*when assistant car inspector does not assume risk of being struck by cars during switching operations.* An assistant railway car inspector, who, after a mail car has been detached from the rest of a passenger train by a road engine and moved from four to six feet from the rest of the cars standing on the track, is working in front of the buffer of the car inspecting it, does not assume the unusual and extraordinary risk of being struck by the foremost car of the rest of the train which, with other cars, is set in motion as the result of a switch engine working at the other end of the train bumping against the standing cars with unusual violence, as such a risk is an extraordinary one.

4. NEGLIGENCE, § 74*—*when person not bound to anticipate negligence of another.* The law does not impose upon one to anticipate the negligence of another, as it is presumed that every person will properly perform the duty which is enjoined upon him by law or imposed by contract.

5. MASTER AND SERVANT, § 716*—*when negligence of defendant in cutting off coaches from cars moving against car repairer question for jury.* In an action for the alleged negligent death of an assistant car repairer as the result of being caught between the buffer of a detached mail car and the foremost car of the rest of the train, while inspecting the detached car, as the result of the moving of the string of cars against him, upon their being struck by a switch engine during the operation of cutting off two coaches from the other end of the train, *held* that it was a question for the jury whether defendant was guilty of negligence.

6. MASTER AND SERVANT, § 759*—*when contributory negligence of car repairer standing between mail car and rest of train question for jury.* In an action for the negligent death of an assistant car repairer who was killed by being crushed between a detached mail car, which he was inspecting, and the rest of the train, from which two coaches were being "cut off" by a switch engine working at the other end of the train, as the result of the engine strik-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ing the cars with such force as to set them all in motion, *held* that it was a question for the jury whether the deceased was guilty of contributory negligence in being in the position he was at the time of the accident.

7. MASTER AND SERVANT, § 98*—*what is effect of contributory negligence on right of recovery under Federal Employers' Liability Act.* Under the Federal Employer's Liability Act, contributory negligence does not bar the right of recovery, but affects the amount of damages which may be recovered, and the damages are to be diminished by the jury in proportion to the amount of negligence attributable to the employee.

8. DEATH, § 63*—*when damages for negligent death not excessive.* In an action for negligent death under the Federal Employers' Liability Act, a verdict for $7,200 upon reduction of $800 for the contributory negligence of the plaintiff, *held* not excessive nor disproportionate.

The People of the State of Illinois ex rel. John Britt, Appellee, v. School Directors of District No. 89 in Stephenson County, Appellants.

Gen. No. 6,150. (Not to be reported in full.)

Appeal from the Circuit Court of Stephenson county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Petition for mandamus by the People ex rel. John Britt, petitioner, against the School Directors of District No. 89 in Stephenson County, respondents, to require said directors to approve the selection made by him of the Freeport high school in district No. 145 in the same town for his son, John J. Britt, and to pay the tuition incurred and to be incurred for the attend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ance of said child at said high school during the current school year. From a decree awarding mandamus as prayed, respondents appeal.

The petition alleged that Britt was a resident and taxpayer of said district No. 89, and was the father of said child, and that said child was within the school age and lived with him, and that he was responsible for the care, nurture and education of said child; and said petition set up the Statute of 1913, entitled "An act to provide high school privileges for graduates of the eighth grade," ch. 122, secs. 470-470g [Cal. Ill. St. Supp. 1916, ¶¶ 10143(1)—10143(8)]. The petition alleged that district No. 145 lay south of and contiguous to said district No. 89 and had a high school therein, and afforded the nearest and most convenient high school accessible to pupils of district No. 89 which offered a full four years' program of study, and was the only high school in said county with such program accessible to pupils of district No. 89; that relator selected said high school for the attendance of his child, and obtained the consent of the school board of said high school for the admission of said child; that said child was a graduate of the eighth grade in said district No. 89; that the tuition per capita of said high school was forty dollars per year, payable semiannually in advance, and did not exceed the per capita cost of maintaining said high school; that there were ample funds in the hands of the treasurer of district No. 89, and there were sufficient funds in his hands on July 1, 1914, to pay such tuition, specifying the amounts, and in addition thereto said district No. 89 levied a tax of five hundred dollars for the general expenses of said district for the current year, and that after paying said expenses there would remain a sum in the hands of the treasurer; that though often requested, the directors of district No. 89 refused to grant the transfer of said child, refused to approve the selection

of said high school, and refused to pay the tuition charged relator for the attendance of said child at said high school, and did this without making any objections to the selection and without designating any other high school. The directors answered, admitting many facts and denying some of the facts alleged, and stating what sums they had contracted to pay during the said school year, and that on July 29, 1914, they levied a tax of five hundred dollars for school purposes for the ensuing year, and that they appropriated said five hundred dollars for certain specified purposes, namely, for salary of teachers, four hundred dollars; for fuel, fifty dollars; for painting schoolhouse, forty dollars; for incidental expenses, ten dollars, and that said child was in attendance at said high school. The relator demurred to certain portions of said answer and the demurrer was sustained. Proofs were heard upon the other issues, and the mandamus was awarded as prayed.

No reason was given in the answer nor appeared in evidence why the directors should not approve the selection of the high school, nor did the answer deny those parts of the petition which showed that it was reasonable that said high school should be approved.

ROBERT P. ECKERT, for appellants.

ALBERT H. MANUS and R. R. TIFFANY, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. SCHOOLS AND SCHOOL DISTRICTS, § 184*—*when order directing school officers to approve high school proper.* On a petition for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

mandamus to compel directors of a certain school district to approve the selection of a high school for relator's child, and to pay the tuition incurred and to be incurred for the attendance of the child at such high school for the current year, where no reason was given in the answer nor appeared in the evidence why the directors should not approve the selection of the high school, and the answer did not deny the parts of the petition which showed that it was reasonable that the high school be approved, *held* that an order directing such officers to approve such high school was proper.

2. SCHOOLS AND SCHOOL DISTRICTS, § 184*—*when right of parent to have tuition of child at high schools in another district paid by his district exists.* Under Rev. St. 1913, ch. 122, secs. 470-470g [Cal. Ill. St. Supp. 1916, ¶¶ 10143(1)—10143(8)], providing that the pupils who are graduates of the eighth grade and are resident in districts not providing a recognized four-year high school course shall be admitted upon the payment of tuition to any recognized high school for the completion of such portion of a four-year high school course as is not provided by the home districts, and that the tuition of such pupils shall be paid by the district in which they reside "from any funds not otherwise appropriated," directors of a district may not defeat the right of a parent to have the tuition of his child for a current year at such a high school paid out of the funds of the district, by dividing up the amount levied for educational purposes so as to appropriate to other purposes all the sum levied for educational purposes.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Charles L. Rogers, Appellant, v. City of Mendota, Appellee.

Gen. No. 6,151.

1. PARLIAMENTARY LAW—*what is proper action by legislative body when measure returned with veto.* Under parliamentary rules, the proper action to be taken by a legislative body when a measure adopted by it has been returned to it by a veto of the proper authority, is to move to reconsider the vote by which the measure was adopted.

2. PARLIAMENTARY LAW—*what is proper action after adoption of motion to reconsider vetoed measure.* Where the majority of a legislative body adopt a motion to reconsider a vetoed measure, it is then proper to move that the measure be adopted notwithstanding the veto, or that it be passed over the veto.

3. PARLIAMENTARY LAW—*when measure adopted over veto.* Where the required majority adopt a motion that a vetoed measure which has been reconsidered be adopted notwithstanding the veto, the passage of ordinances over veto of the mayor, made for-

4. MUNICIPAL CORPORATIONS, § 85*—*what is effect of departure from form prescribed for passage of ordinance.* Departure from the form prescribed for the passage of an ordinance will not affect the validity of such action unless the governing law makes such formality vital.

5. MUNICIPAL CORPORATIONS—*what constitutes a reconsideration of vetoed ordinance.* In an action by a mayor to recover salary due him, in which it was contended that an ordinance reducing the salary of the mayor was invalid because a motion to reconsider the vote by which the ordinance was originally passed was not made before adopting the ordinance over the mayor's veto, *held* that as neither the general act for the incorporation of cities, article III, sec. 19 (J. & A. ¶ 1319), nor a city ordinance governing the passage of ordinances over the veto of the mayor, made formality vital, the action of the city counsel, upon the ordinance being returned by the mayor, in making, seconding and carrying a motion by a vote of six to one that the ordinance be passed over the mayor's veto, constituted in effect a reconsideration and the ordinance was consequently lawfully passed.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number

McDOUGALL & CHAPMAN, for appellant.

B. HARRY RECK, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Charles L. Rogers became Mayor of the City of Mendota on May 5, 1913, and was still serving as such when this suit was begun. Up to March, 1913, there was in force in said city an ordinance which fixed the salary of the mayor at $75 per quarter. In March the city council passed an ordinance making the salary of the mayor $60 per year. The mayor vetoed it and an attempt was made to pass the ordinance over his veto. The new mayor would not accept the reduced salary and the city council claimed that the ordinance reducing the salary had been lawfully passed over the mayor's veto. On February 6, 1914, the mayor brought this suit against the city to recover the salary then due him and filed an appropriate declaration, to which the city pleaded the general issue. A jury was waived and the cause was tried upon a stipulation as to the facts. If the plaintiff is right, he was entitled to a judgment for $225; if the city is right, he was entitled to a judgment for $45. The court entered judgment for $45, and plaintiff below appeals.

The record of the city council shows that after the mayor returned the ordinance with a veto message, a motion was made that the ordinance be passed, notwithstanding the mayor's veto, and that said motion was adopted by a vote of six to one, the yeas and nays being entered of record. It was stipulated that that action was preceded by the following, which was not entered of record: Upon the presentation of the veto message, an alderman moved that the vote by which said ordinance was passed be reconsidered for the purpose of passing the same over the mayor's veto; that

another alderman seconded said motion; that the mayor declared said motion out of order and refused to entertain it; that the alderman who made the motion then appealed from the decision of the chair; that the mayor refused to entertain said appeal, but announced that if the council wished to pass said ordinance the proper motion was that the ordinance be passed notwithstanding the mayor's veto. Thereupon the maker of the original motion moved that said ordinance be passed notwithstanding the veto, which motion was seconded and carried by a vote of six to one, and the mayor then announced that the ordinance was passed over the veto. The sole question is whether the ordinance could be again put upon its passage and adopted without a motion to reconsider the vote, by which the ordinance was originally adopted, being passed.

By parliamentary rules the proper action to be taken by a legislative body when a measure adopted by it has been returned to it with a veto by the proper authority, is to move to reconsider the vote by which the measure was originally adopted. If a majority of the legislative body adopt the motion to reconsider, it is then proper to move that the measure be adopted notwithstanding the veto, or that it be passed over the veto. If the required majority adopt that motion, the measure is adopted; if not, the veto stands. The City of Mendota is organized under the general act for the incorporation of cities. (J. & A. ¶ 1271 *et seq.*) Section 19 of article III of said Act (J. & A. ¶ 1319) is as follows: "Upon the return of any ordinance by the mayor, the vote by which the same was passed shall be reconsidered by the council; and if, after such reconsideration, two-thirds of all the members elected to the city council shall agree, by yeas and nays, to pass the same, it shall go into effect, notwithstanding the mayor may refuse to approve thereof. The vote to pass the same over the mayor's veto shall be taken by

yeas and nays, and entered on the journal." There was in force in the City of Mendota an ordinance in substantially the same language. No vote to reconsider was adopted in this case. The appellant contends that therefore the ordinance was never adopted.

It is said in McQuillan on Municipal Ordinances, sections 115 and 116, that departure from the form prescribed for the passage of an ordinance will not affect the validity of such action unless the governing law makes such formality vital, as, by declaring the ordinance void unless the form prescribed be followed; and that the courts generally regard noncompliance with merely formal requirements in the manner of enacting an ordinance no ground for declaring it void. Here, neither the statute nor the ordinance on that subject declare the ordinance void unless a formal vote to reconsider be first adopted. The proper motion was made. The vote by which the ordinance was passed over the veto shows that the motion to reconsider would have been adopted if it had been put. It is not to be expected that aldermen will be experts in parliamentary law. The objection is purely technical. Six of the seven aldermen desired and intended to reconsider the vote and pass the ordinance. To reconsider does not necessarily require a formal vote. We are of opinion that the true rule to be followed by the courts in construing such action was stated in *Lake v. City of Ocean City,* 62 N. J. L. 160, and *Oakley v. City of Atlantic City,* 63 N. J. L. 127. See also, *Mann v. City of LeMars,* 109 Iowa 251; *Whitney v. Village of Hudson,* 69 Mich. 189; 28 Cyc. 352. We do not consider that *People v. Chicago, B. & Q. R. Co.,* 266 Ill. 150, relied upon by appellant, is applicable. There the city council not only did not move to reconsider the ordinance there vetoed, but it did not have a motion to pass the ordinance notwithstanding the veto. On the contrary it proceeded to prepare and pass new provisions not contained in the original ordinance, and these new pro-

visions were held not lawfully adopted. In *Fairfield v. People,* 94 Ill. 244, on pp. 259, 260, where a mayor had vetoed certain items of an appropriation ordinance, and the council had passed most of said items over the veto, and nothing is said about a motion to reconsider, and apparently there was no such motion, the court said that it considered that the subsequent action of the council "amounted in law to an adherence to appropriations previously made, the mayor's veto to the contrary notwithstanding." We are of the opinion that the action of the city council in taking up the matter and voting upon it after the mayor had vetoed the ordinance should be held as in legal effect a reconsideration, and as this was done by a two-thirds vote, the ordinance was lawfully passed over the mayor's veto. The judgment is therefore affirmed.

Affirmed.

Joseph W. Maple, Administrator, Appellee, v. Stephen G. Lawhun, Appellant.

Gen. No. 6,175. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Proceedings by citation under section 81 of the Administration Act (J. & A. ¶ 130), by Joseph W. Maple, as administrator of the estate of Margaret M. Hemmerly, deceased, petitioner, against Stephen G. Lawhun, respondent. From an order against respondent on his appeal to the Circuit Court from the Probate

Court and a trial there *de novo*, requiring him to turn over to the administrator a certain fund of $4,000, derived from the sale of certain securities, with certain interest charges thereon, and a certain note, executed by David Slaman, for $6,395 and a mortgage securing the same, and certain interest charges in connection therewith, respondent appeals.

WEIL & BARTLEY, for appellant.

TICHENOR, TODD & WILSON, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 35*—*when possession is proof of title.* As a general rule the possession of personal property is proof of title.

2. EXECUTORS AND ADMINISTRATORS, § 97*—*when burden of proof upon confidential agent to show right to personalty in his possession after death of owner.* A confidential agent of the owner of personal property who has lawful access thereto and abundant opportunity to transfer it to his possession without the knowledge of the owner, and has possession of the property after the death of the owner, is required to assume the burden of establishing as a defense that he came by such property in good faith in proceedings by citation under the Administration Act (J. & A. ¶ 130).

3. EXECUTORS AND ADMINISTRATORS, § 97*—*when evidence sufficient to show fiduciary relation.* In proceedings by citation under the Administration Act, sec. 81 (J. & A. ¶ 130), for the discovery of concealed effects of a decedent alleged to be in possession of respondent, evidence *held* sufficient to show the existence of a fiduciary relation between decedent and respondent.

4. EXECUTORS AND ADMINISTRATORS, § 97*—*when evidence sustains finding that respondent did not make expenditures out of own or borrowed funds.* In proceedings by citation under the Administration Act, sec. 81 (J. & A. ¶ 130), for the discovery of concealed effects of a decedent alleged to be in possession of respondent, evidence *held* sufficient to sustain a finding that respondent did not expend money for the building of a house for decedent, for which he claimed the right to certain securities belonging to decedent in payment, out of his own or borrowed funds.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

5. EXECUTORS AND ADMINISTRATORS, § 97*—*when evidence sufficient to show that note belonging to decedent not given in payment for services.* In proceedings by citation under the Administration Act, sec. 81 (J. & A. ¶ 130), for the discovery of concealed effects of a decedent alleged to be in possession of respondent, evidence *held* sufficient to sustain a finding that a note belonging to decedent was not given to respondent in payment for alleged services.

Edward I. Rubendall, Appellee, v. Horace Tarbox et al., Appellants.
Evans Plumbing & Heating Company et al., Appellees.

Gen. No. 6,176.

1. APPEAL AND ERROR, § 910*—*when supplemental record may be certified and filed by clerk.* A supplemental record on appeal may be prepared and certified by the clerk and filed without the suggestion of a diminution of the record and issuance and service, on the clerk, of a certiorari.

2. APPEAL AND ERROR, § 963*—*what is effect of certified record on appeal.* A record on appeal, duly certified by the clerk of the court below, imports verity, and cannot be contradicted by affidavits.

3. APPEAL AND ERROR, § 963*—*when affidavit attacking correctness of certified record insufficient.* An affidavit attacking the correctness of a record on appeal in a chancery proceeding, duly certified by the clerk of the court below, which merely shows that in the chancery record, for the day on which the bill was filed and summons thereon issued, no *placita* appears, is insufficient, since a proper *placita* entered for that day in the common-law record, which the reviewing court would have to assume was entered, would supply such omissions.

4. APPEAL AND ERROR, § 943*—*how omission of clerk to enter placita in chancery record may be supplied.* Since the Circuit Court, when properly convened, is open for the transaction of both common-law and chancery business, the omission of the clerk to en-

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ter a *placita* in the chancery record, on the day on which a bill was filed and summons thereon issued, may be supplied, on making up a record of the suit on appeal, by using the *placita* entered on that day in the common-law record.

5. APPEAL AND ERROR, § 494*—*when defendant may not object that other defendants were defaulted improperly.* In a proceeding to establish mechanics' liens, a defendant cannot, on appeal, object that other named defendants were defaulted by an order in which they were not named, where such objecting defendants did not object thereto before going to a hearing before the master, nor raise such question in their objections or exceptions to the master's report, nor at any time in the trial court, and where, in the final decree, such defendants were defaulted by name.

6. EQUITY, § 422*—*when master may report all stipulations and agreements made orally by parties upon a reference.* It is a valid practice for a master, upon a reference, to report all stipulations and agreements made orally by the parties appearing before him.

7. APPEAL AND ERROR—*when objection that witness not properly sworn may not be made for first time on appeal.* Objections that witnesses before a master in chancery were not properly sworn will not be considered where made for the first time on appeal from the decree.

8. APPEAL AND ERROR, § 1272*—*when presumed that questions correctly decided in trial court in absence of abstract.* Where the appellant in a proceeding to establish a mechanic's lien fails to abstract the evidence and objections filed to the master's report, no questions of fact are raised, and all such questions must be presumed to have been correctly decided by the court below.

9. MECHANICS' LIENS, § 202*—*when judgment proper in form.* A decree in a proceeding to establish a mechanic's lien that the defendants named do pay certain sums, and in case of default the master is ordered to sell the premises, *held* not a money decree but one in the alternative, and valid.

10. MECHANICS' LIENS, § 212*—*when defendant failing to assert lack of liability in lower court bound as owner.* A defendant in a proceeding to establish a mechanic's lien *held* liable as owner of the premises, though she had never signed the written contract for the construction of the building, entered into by co-owners with her authority, where she did not allege in her answer that she was not bound thereby, and made no objection to the master's report which found her liable, or in any way asserted in the lower court her lack of liability, but had purchased the interest of a co-owner and accepted a deed binding her to pay the unpaid cost of the erection of the building.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rubendall v. Tarbox, 200 Ill. App. 260.

11. MECHANICS' LIENS, § 202*—*when decree not objectionable because ordering building owned by several defendants sold as a whole.* A decree in a proceeding to establish a mechanic's lien on premises consisting of a single building erected upon land, separate portions of which were owned by different defendants, *held* not objectionable because the amount due was not apportioned among the various defendants, inasmuch as an apportionment was impracticable.

12. MECHANICS' LIENS, § 212*—*when failure to apportion amount due against the various owners may not be raised on appeal.* The question of the apportionment of the amount due among the several owners of a building, in proceedings to establish a mechanic's lien upon premises instead of ordering the building sold as a whole for the entire debt, may not be raised on appeal where no such objection was raised in the court below nor claim to that effect made in the answer.

13. EQUITY, § 440*—*when re-reference to master unnecessary.* Where, in a proceeding to establish mechanics' liens, the master allowed the entire claim of a material man for materials furnished, both under his contract with the building contractor and directly to the owners after the contractor's discharge, *held* that the chancellor's action, in deducting from such allowance the amount accruing before the contractor's discharge and adding it to his allowance, was proper without referring the matter again to the master, though the contractor in his bill stated that he was uncertain whether or not he was entitled to such item, inasmuch as it was immaterial to the owners who received payment for such item and the material man had assigned no cross error on such action.

Appeal from the Circuit Court of Stephenson county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 24, 1916. *Certiorari* denied by Supreme Court (making opinion final).

CUTHBERT D. POTTS and EDWARD ROBY, for appellants.

LOUIS H. BURRELL and CHARLES H. GREEN, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

This record begins with a bill of complaint by Edward I. Rubendall against twenty-three defendants for a mechanic's lien on Lots 1 and 10, Block 56, in the original Town of Freeport, Stephenson county, Illinois, and ends with a decree establishing liens upon said property in favor of Rubendall for $3,697.23, with interest thereon at five per cent. per annum from April 4, 1913, and in favor of the Evans Plumbing & Heating Company for $519.74, and interest thereon at five per cent. per annum from July 7, 1913, from which decree those defendants who were owners of said real estate at the entry of said decree, to wit, Horace, Mary, Winifred and Ruth Tarbox, prosecute this appeal. After the record was filed in this court, those who had theretofore been solicitors for said defendants withdrew their appearance and other solicitors who had been strangers to the litigation thereafter conducted the cause in this court. In their original brief herein it was contended that there is no *placita* in the record, and therefore the court never acquired jurisdiction of the cause; that the bill of complaint was never filed and therefore the clerk had no authority to issue a summons and the service of the summons conferred no jurisdiction; that the summons was without seal and was therefore void; that certain amendments, subsequently filed to the bill of complaint, constituted an amended bill and that equity practice required that a new summons should be issued under said amended bill, and as none was issued no jurisdiction was acquired; that the large number of defendants who never answered were never defaulted and therefore the cause was never at issue and could not be referred to the master or go to a final decree; that a supposed order defaulting all defendants who had not entered their appearance was void because no defendants were named; that the cause was never referred to the master; that a supposed order of reference and numerous other orders set out in the record were not orders of

court because not preceded by anything showing a court in session; that various recitals by the master in his report that certain parties stipulated before him to begin the hearing of proofs on a certain date, and to adjourn the hearing of proofs to certain dates, and that a certain witness, if present, would testify to certain specified facts, and that certain other specified facts were admitted, and that the signatures of the witnesses were waived, are all void because the master is without power to state his conclusions that such stipulations were made before him, but that in each case there should have been a written stipulation signed by the parties or their solicitors, and for want thereof the parties are not bound by any such statements in the report; that about one-half of the witnesses before the master are not stated to have been sworn and therefore their evidence must be rejected; that the rest of the witnesses before the master, though stated to have been sworn, are not shown to have been sworn to testify to the truth, but they may have been sworn to perform some official act, and also that the report does not show by whom the oath was administered, and therefore their testimony is void and must be rejected, and there is no evidence in the record; that Mary Tarbox never signed the contract upon which the suit is founded and therefore no mechanic's lien could be entered against her property; that different parts of the land upon which the building in question rests are owned severally by different defendants and that the decree is erroneous because it does not make specific sums liens upon the real estate owned by each, but gives one lien upon all the land; that there is a money decree against the appellants and that such a decree cannot be had in a suit to establish a mechanic's lien, and that no such money decree in any event could be entered against Mary Tarbox because she did not sign the contract.

Thereupon, appellees Rubendall and the Evans

Plumbing & Heating Company, by leave of court, filed a supplemental record, which showed that there should be inserted at the beginning of the record a certain *placita,* set out in said supplemental record, and that certain other *placitas* and convening orders showing the court in session should be inserted at certain specified pages of the original record; and various other matters were specified therein; and the clerk certified that said original record, filed herein, and said additions thereto, constitute a complete record of the cause as appeared from the records and files of his office. It is argued that this court should not have permitted said supplemental record to be filed. Apparently it is meant that the clerk could not of his own motion prepare such a supplemental record, but that a diminution of the record should have been suggested, and a certiorari issued and served upon the clerk and a record filed by him in obedience thereto. In the case entitled "*Anonymous,*" 40 Ill. 53, a transcript of the record had been filed and afterwards an amended transcript was filed, and counsel inquired whether the amended transcript was to be regarded as the record or only a part of the first record, to which the court replied: "The last record sent up we regard as a part of the former record, and as supplying its defects." In *Flagler v. Crow,* 40 Ill. 70, it was held that where there is no objection, plaintiff in error will be permitted to file an additional transcript of the record instead of applying for a certiorari; and in *Rowley v. Hughes,* 40 Ill. 71, it was suggested by counsel that the clerk of the court below had omitted to copy a seal to an acknowledgment appearing in the transcript, and the court held that the clerk below could copy the certificate of acknowledgment and the deed, if necessary, to show its identity, and attach the seal, and certify it accordingly; and counsel then asked if it was necessary that a writ of certiorari should issue to make

the additional transcript a part of the record, and the court said: "No writ of certiorari is necessary; the party interested in making the amendment can file it as an additional or amended record, and it will be considered in connection with the original transcript." In *Goodrich v. Cook*, 81 Ill. 41, it was assigned for error that there was no evidence in the record sustaining a part of the decree. Defendant in error then filed an additional record, setting out the omitted evidence. After passing on certain other objections, not material here, the court held that when the supplemental record was filed it became a part of the record in the case and must be considered as if it had been incorporated in the original record. In *Vahle v. Brackenseik*, 145 Ill. 231, it was insisted in the Appellate Court that the record did not show service upon the appellant. Appellee obtained leave to file an additional record showing service upon appellant. Appellant moved to strike the amended record from the files, and that motion was denied, and that action by the Appellate Court was assigned as error in the Supreme Court because the amended record was permitted to be filed instanter without notice to appellant and without the issue of a certiorari. It was held that the practice adopted by the Appellate Court was proper and consistent with the uniform practice in the Supreme Court, and that when an amended record has been made and properly certified and is ready to be filed, the issuance of a certiorari is unnecessary. We are therefore of the opinion that the objections to this additional record are not well taken. There is an affidavit on file by one of counsel for appellants, which is in conflict in part with said additional record, and it seems to be therefore insisted that said additional record is not true; but we are of opinion that the record duly certified by the clerk of the court below imports verity and cannot be so contradicted. But, if it could be, the showing is insufficient.

Said affidavit shows that the solicitor making it visited the office of the clerk of the court below, since the record was filed here, and examined the chancery record and did not find therein certain *placitas* and certain convening orders certified in this amended record to be part of the record of the court below, and especially a *placita* as of the day when the amended record shows the bill was filed, being the day when the summons was issued and dated. The affiant does not claim to have searched the common-law record on the same day, and if this affidavit were to be considered we would be required to assume that there was in the common-law record a *placita* showing the Circuit Court duly organized and transacting legal business. There are not two separate Circuit Courts, one at law and the other in chancery; and if the court is properly convened it is for the transaction of all kinds of business, unless the statute provides otherwise. If on a particular day the clerk had failed to enter a proper *placita* in the chancery record, we do not doubt that in preparing a record in a chancery cause the clerk could take the *placita* appearing in the common-law record for that day and thus make it appear that the court was duly organized when a certain bill in chancery was filed. Incidentally, it was made to appear that the former solicitor for appellants prepared this record and omitted therefrom the various matters incorporated in the additional record, and that the clerk failed to notice these omissions when he certified to the original record. We are of opinion that the additional record stands unimpeached as a part of the cause now before us.

From the whole record now before us it appears that the record is introduced by a sufficient *placita;* that the bill of complaint was in fact filed on July 29, 1913, on which day the summons was issued; that said summons was authenticated by the proper seal; that the amendment to the bill and the answers were duly filed; that the several orders which appellants in their brief

treat as nullities were in fact entered in this cause in term time; that the final decree was duly entered in term time; and that many other supposed technical errors in the record do not exist. The four appellants and the Evans Company answered. Bessie Shoemaker was defaulted. Afterwards an order was entered, defaulting all defendants who had not entered an appearance. We are of opinion that it was not necessary that each defaulted defendant should be named, but if there were any doubt about that, appellants did not object to going to a hearing before the master because some defendants had not been sufficiently defaulted, nor did they raise any such question in their objections or exceptions to the master's report, nor did they ever raise the question in the court below. Moreover, in the final decree the defendants were again defaulted, the name of each defaulted defendant being expressly stated. We hold that it is a recognized and valid practice, upon a reference to a master, for that officer to report all stipulations and agreements made orally by the parties appearing before him. If the rule were otherwise, still appellants did not object to the master's report on the ground that such agreements and stipulations were incorrectly reported by him, or that he lacked the power to make such a report. Nor do their objections claim that the witnesses were not duly and properly sworn before the master. That point was not raised in the court below. Appellants' discussion of the "loose leaf" system of keeping court records, if it were before us, is answered in *People v. Ward,* 272 Ill. 65.

The evidence taken before the master occupies over 1,100 pages of this record. Appellants have not abstracted it. They did not abstract any of the objections which they filed to the master's report. They therefore have not raised upon this record any question of fact, but all questions of fact must be presumed to have been correctly decided by the court below. Ap-

pellee Rubendall has abstracted those objections in order to show that, almost exclusively, they relate only to questions of fact, and that the objections now most insisted upon by appellants were not raised by appellants by objections to the master's report, and therefore in the main they cannot be considered here.

After fixing the amounts due to appellees, Rubendall and the Evans Company, the final decree proceeded as follows: "That the defendants Mary Tarbox, Horace Tarbox, Winifred Tarbox and Ruth Tarbox do pay the said several sums in this decree mentioned within forty days from this date, and in case of default in the payment of said sums or either of them, that then and in that case the master in chancery of this court is ordered to sell said described premises," etc. This is not followed by any provision that said defendants shall be liable for any deficiency if the sale of the premises does not produce the amounts named. It is argued that this is a money decree, and that a money decree cannot be lawfully entered in a suit for a mechanic's lien. We hold that this is not a money decree, but is in the alternative, and means only that unless the defendants pay said sums within the time limited, the premises shall be sold. This is held in *Gochenour v. Mowry,* 33 Ill. 331; *Glover v. Benjamin,* 73 Ill. 42; *Kirby v. Runals,* 140 Ill. 289; *Roberts v. Flatt,* 142 Ill. 485; *Bumgartner v. Hall,* 163 Ill. 136; and so we held in *Pierce v. Coryn,* 139 Ill. App. 445. It is also said that a decree is not justified against the interest of Mary Tarbox, one of the appellants, because she did not sign the written contract relied upon in the bill of complaint. The bill shows that she did not sign it, but alleges that it was made with full authority from her and that she knowingly permitted the other appellants to contract for the erection and construction of said building. In her answer she, with the other appellants, admitted that they all entered

into said agreement, and she did not allege in said answer that she was not bound because she did not sign it. She joined in the defense before the master, and made no such objection to the report which found her liable. Before the building was completed she purchased the interest of Bessie Shoemaker in said real estate and accepted a deed from Bessie Shoemaker to Mary Tarbox, which bound the latter to pay the unpaid cost of the erection of said building. She never asserted in the court below any lack of liability on her part for whatever, if anything, was justly due to Rubendall and the Evans Company. We hold that the decree correctly held her bound with the other owners.

Each appellant owned separate interests in a part only of the land upon which this building was erected, except that one of them owned an easement in some of the land belonging to the others, and that several of them owned one piece jointly. It is claimed by appellants that the amount of the lien should have been apportioned among the several pieces, and that for this reason the decree for the sale of the whole for the entire debt is erroneous. The appellants were the heirs of the Tarbox estate and contracted to put one building upon all their holdings. Their answer is very insufficiently abstracted. It admits very many things charged in the bill. It nowhere claims that the lien ought to be apportioned among the several pieces of land. Appellants had caused an architect to prepare plans and specifications under which the building was erected, and these plans and specifications are in the record and are not abstracted. They show that this was a contract to erect a single building of six stories under one roof, with one elevator and one furnace for the entire building, and that the lines of the various division walls within the building do not correspond with the lines of the respective portions owned by the respective parties. They show that it would be impos-

sible, or at least utterly impracticable, to apportion the total cost of the building among these several small pieces of land. No such question was raised by the objections filed by the appellants to the master's report, and it therefore was not raised in the court below. Portions of the Mechanics' Liens Act contain provisions applicable to somewhat similar situations. The decree in this respect appears to be supported by the principles laid down in *Bastrup v. Prendergast,* 179 Ill. 553; *Mantonya v. Reilly,* 184 Ill. 183; *Berndt v. Armknecht,* 50 Ill. App. 467; *Christian v. Illinois Malleable Iron Co.,* 92 Ill. App. 320. As the parties chose to contract to erect such a building upon lands severally owned by them, we are of opinion that it was not error to place a lien upon the entire tract for the entire amount due, and that otherwise the contractors would be defeated of their just rights.

The bill alleges, and upon this record it must be assumed, that the evidence showed that the owners applied to Rubendall to superintend the erection of this building before the architect had completed the plans and specifications, and that a verbal contract was made between him and them, under which he began work on April 9, 1912, and did considerable work before those plans and specifications were completed, and that on April 25, 1912, he and the owners executed the written contract set out in the bill, and that it was agreed that what he had done before the written contract was executed should be treated as done under that contract. By that contract he was to procure the building to be erected and purchase the material and superintend the building, and render the owners bills for what he actually expended, and they were to pay him the money therefor within three days after they received each bill and he was to have three per cent. on the total cost for his remuneration, and he was to erect it according to the plans and specifications,

and according to and under the direction and to the entire satisfaction of Horace Tarbox, one of the owners, who was thereby made the agent of the other owners. There were two buildings on different parts of this land before this contract was made, and the new building was to include and enlarge and repair the old buildings and make them parts of one larger and higher building. Rubendall thereupon made many contracts for labor and material and rendered appellants many bills, part of which they paid. Sometimes Horace Tarbox took the matter out of the hands of Rubendall and made contracts himself and paid subcontractors directly. On April 7, 1913, Horace Tarbox discharged Rubendall and the latter had no further connection with the work. The chief litigated question was one of fact whether Rubendall had properly erected the building. That has been decided against the owners, and, as already seen, is not presented for review here. After the master made his first report the cause was again referred to him on one point, and the Evans Company amended its answer and cross-bill in one respect by leave of court so as to indicate that it acted under the direction of Horace Tarbox in doing certain things after Rubendall was discharged on April 7, 1913. The master reported, giving the Evans Company a lien for its entire unpaid bill. Without again referring the cause, the court took from the amount allowed the Evans Company all its unpaid bill accruing before Rubendall was discharged, and added that to the amount the master had allowed Rubendall, after deducting from the allowance to the Evans Company a small sum, to which objection twenty-three by appellants had been sustained. Appellants claim that this should not have been done without a re-reference. We hold a re-reference unnecessary under *Henderson v. Harness,* 184 Ill. 520; *Ennesser v. Hudek,* 169 Ill. 494; and *Wolfe v. Bradberry,* 140 Ill. 578, and other

cases. It is also urged that this change was improper under the pleadings. The bill stated that complainant was uncertain whether he was entitled to recover for the materials furnished by the Evans Company while he had charge of the work, or whether the Evans Company should recover that in its own name. We are required to assume that the evidence justified the action of the court. It does not harm appellants, for it must be immaterial to them whether the sum in question is paid to the Evans Company or to Rubendall for it. The Evans Company has not assigned any cross error on this action and it is bound by this decree. We find no reversible error in the record and the decree is therefore affirmed.

Affirmed.

Mary Virginia Marcy, Executrix, Appellant, v. Milton S. Marcy, Appellee.

Gen. No. 6,180. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded with directions. Opinion filed April 14, 1916.

Statement of the Case.

Bill in equity for an accounting filed by Mary Virginia Marcy, executrix under the last will and testament of Walter E. Marcy, deceased, complainant, against Milton S. Marcy, defendant. From a decree against her, the complainant appeals.

R. Sumner Marcy died in New Jersey on March 5, 1894, owning real and personal estate in New Jersey

and leaving a last will which was duly admitted to probate. By his will he gave his widow, Mary S. Marcy, his personal property and the use of his real estate so long as she remained his widow, but authorized his executors in their discretion to sell his real estate during her lifetime and invest the proceeds and pay the income therefrom to his widow, and directed that at her remarriage or death the executors should sell said real estate. The will gave legacies of $100 each to his son, Milton S. Marcy, to his daughter, Hetty O. Miller, and to his grandson, Sumner M. Miller, and his granddaughter, Anna Miller, said legacies to the grandchildren to be paid to them at the age of eighteen years, which they have long since reached. The residue of his estate was given to his son, Walter E. Marcy, and his daughter, Lucy E. Marcy, both of whom were blind from birth; and said residuary clause contained certain provisions if either or both of them should die without lawful issue. The will nominated Mary S. Marcy and Milton S. Marcy as executors, but they declined to qualify and an administrator with the will annexed administered the estate. The widow never remarried and she died on January 27, 1907. During her lifetime the administrator and each of the beneficiaries joined in a deed, conveying certain real estate left by the deceased for $3,639.47. By consent of all the beneficiaries under the will, $639.47 of the consideration for which said real estate was sold was paid to the widow to be used by her as she saw fit, and the remaining $3,000 was placed in the hands of Milton S. Marcy for investment, and he was to pay over the income and distribute the principal in accordance with the will of the testator. Under this arrangement the four legacies of $100 each were not paid, and the interest on said $3,000 was divided equally from time to time between Walter and Lucy. Afterwards Walter conveyed to Lucy whatever interest he had in another piece of real estate left by the testator, and in payment

therefor Lucy directed Milton to transfer $800 of her share of said fund to Walter's part of said fund, and thereafter Milton paid the interest on $2,300 to Walter and on $700 to Lucy. On February 15, 1912, Walter died without issue and left a will which was duly probated, whereby he gave all his property to his widow, Mary Virginia Marcy, and made her executrix of his will. She claimed that at his death Walter owned $2,300 of said fund in the hands of Milton, and demanded it of Milton, and Milton refused to pay it. Thereupon as executrix and in her own right she filed a bill in equity against Milton S. Marcy in the Circuit Court of Peoria county, where Milton resided, for an accounting of the investment of said $2,300 for the payment to her of the principal thereof and interest thereon since the death of Walter. In said bill, she claimed that the expression "die without lawful issue" in the residuary clause of the will of R. Sumner Marcy meant die without issue before the expiration of the life estate granted to the widow, and that when Mary S. Marcy died while Walter was still living, he then became the absolute owner of said $1,500 and of said $800, and she therefore was entitled to the same under the will of Walter. Milton answered, claiming that under a true construction of said residuary clause, it meant "die at any time without lawful issue"; that when Walter died without issue, the whole income passed to Lucy during her lifetime; and that when she died, if without issue, then by virtue of certain other language in said residuary clause, making provision for the death of both Walter and Lucy without lawful issue, the fund would first go to pay said four legacies of $100 each and the rest to Milton S. Marcy and Hetty O. Miller, or to the survivor of them if only one was then living. Under an order of reference the master took the proofs and reported that Milton should pay from said fund the costs and the four legacies of $100 each, and should divide the residue into two equal

parts, and should pay complainant one-half thereof and $800 from the other half, and should pay the balance to Lucy. The court sustained some and overruled other exceptions to said report, and held that all the funds vested in Lucy upon the death of Walter as well as the income accruing after the death of Walter and dismissed the bill for want of equity.

MILES & FULLER, for appellant; A. D. HARRINGTON, of counsel.

RICHARD H. RADLEY for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. EQUITY—*when court may on its own initiative require proper parties to be brought in.* Though lack of proper parties is not set up in a chancery proceeding, the court will, whenever it finds such lack of proper parties, take notice, *ex officio*, of such omission and refuse to proceed until the pleadings have been amended and the omitted parties brought into court.

2. TRUSTS, § 242*—*who proper parties to bill for accounting against trustee upon death of beneficiary.* Where a testator, after giving his widow the use of his real estate so long as she remained single, made provision for certain specific legacies and bequeathed the residue to his two blind children, with certain provisions for further distribution in case they should die without lawful issue, and the widow's interest was by consent of all parties satisfied by a cash payment from the proceeds of a sale of the real estate, and the residue placed in the hands of a trustee for the use of the blind children, and on the death of one of them without lawful issue, his widow filed a bill for an accounting against the trustee, *held* that the other residuary legatee and the specific legatees, or their legal representatives, their legacies not having been paid, were all proper parties and should be brought in before a decree could be properly entered in the suit.

NIEHAUS, J., took no part in this decision.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James T. Burns, Administrator, Appellee, v. Nellie Clark, Appellant.

Gen. No. 6,184. (Not to be reported in full.)

Appeal from the Circuit Court of Kankakee county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Action of assumpsit by James T. Burns, administrator of the estate of Carrie Langdon, deceased, plaintiff, against Nellie Clark, defendant, to recover the amount of a bank deposit made by the defendant and alleged to have consisted of money belonging to the plaintiff's intestate. From a judgment for plaintiff, defendant appeals.

Mrs. Nellie Clark, Mrs. Carrie Langdon and Levi Benjamin were sisters and brother. Dr. F. R. Langdon, husband of Carrie Langdon, died at Louisville, Kentucky, early in February, 1913. Benjamin and Mrs. Clark went there to the funeral. Mrs. Langdon was suffering from an incurable disease and after the funeral her brother and sister brought her to the home of Mrs. Clark in Kankakee, Illinois. Mrs. Langdon had money in a bank in Louisville, and before they left there Mrs. Clark was in possession of the amount Mrs. Langdon had in the bank in the shape of a draft or check which she brought with them to Kankakee. Shortly after they reached Kankakee, probably the next day, and on February 13, 1913, Mrs. Clark opened a checking account in a bank in Kankakee in the name of "Mrs. P. R. Langdon or Nellie Clark," and deposited on that day to said account said draft or check in the sum of $3,179.90, and received a deposit book in the same name. On June 5, 1913, Mrs. Clark drew out that sum of money and closed the account. On June

8, 1913, Mrs. Langdon died. Thereafter plaintiff became administrator of Mrs. Langdon's estate and brought this suit to recover the amount of said deposit. Mrs. Clark, in defense, proved by various witnesses declarations by Mrs. Langdon. Some to the effect that she had given this draft or this money or all her money to Mrs. Clark, and others that she wanted or intended to give this money or her property to Mrs. Clark. A few days before Mrs. Langdon died, Mrs. Latimer, a daughter of Mrs. Langdon by a former marriage, and her husband, came from their home in Springfield, Ohio, to Kankakee, upon a telegram from Mrs. Clark, and remained there until after the funeral of Mrs. Langdon. They had a conversation with Mrs. Clark after the funeral concerning this money deposited in the Kankakee bank. They testified that Mrs. Clark at first denied that there was any money in the Kankakee bank belonging to Mrs. Langdon, and that when Latimer told her that they had been to the bank and ascertained that Mrs. Langdon had money on deposit there, Mrs. Clark then admitted to them that their mother had about $3,200 on deposit in the bank. In rebuttal, Mrs. Clark was called as a witness in her own behalf as to said conversation, and she placed the conversation at a different hour of the day from what the Latimers did, and gave a somewhat different version of it, but stated that she in that conversation said to them: "She (meaning Mrs. Langdon) gave all the money she had to me to pay her bills." No effort was made by the defendant to prove what bills were incurred nor what sums she paid upon any bills for Mrs. Langdon. Dr. Brown, a witness for defendant, attended Mrs. Langdon during the entire four months. He was not asked the amount of his proper charges for his services to her, nor whether he had been paid, nor by whom.

T. W. SHIELDS, H. F. RUEL and A. E. SMITH, for appellant.

WALTER C. SCHNEIDER and FRANK J. BURNS, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to sustain judgment for administrator for amount of bank deposit.* In an action of assumpsit by an administrator to recover the amount of a bank deposit, consisting of money of the intestate which the defendant had deposited in her name and that of the intestate jointly, a judgment for the plaintiff was sustained where there appeared in the evidence, among other things, a statement by the defendant that the money was given her by the intestate to pay her bills with, and there was no evidence introduced to show what bills had been paid or the amount thereof.

2. WITNESSES, § 1131*—*when competent to testify as to conversation relative to estate.* In an action by an administrator to recover of the defendant money alleged to have belonged to the intestate and deposited in a bank by the defendant in her name and that of the intestate jointly, such defendant and a third party are competent to testify as to a conversation between them, occurring after the intestate's death, as to whether such a deposit was made and the purpose for which it was made.

3. SET-OFF AND RECOUPMENT, § 4*—*what is recoupment.* Recoupment is the act of abating a part of a claim on which one is sued, by means of a legal or equitable right resulting from a counter claim arising out of the same transaction.

4. SET-OFF AND RECOUPMENT, § 17*—*when defendant in action by administrator may recoup expenses.* In an action by an administrator to recover the amount of a bank account alleged to have belonged to the intestate and deposited in her name and the name of the defendant jointly, the defendant may, under the plea of nonassumpsit, recoup the amount thereof expended in paying bills of the intestate, if the evidence shows that was the purpose for which the deposit was made and what such bills were and the amount thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

E. B. Butler and F. O. Butler, partners, trading as Butler Brothers, for use of Thomas Woulf, Appellees, v. National Live Stock Insurance Company, Appellant.

Gen. No. 6,205.

1. PLEADING—*when plea to jurisdiction not waived.* A defendant does not, after a demurrer to a plea to the jurisdiction has been sustained, waive such plea by making motions to dismiss the suit, because no bond has been filed to protect a nominal plaintiff, and for a rule on the plaintiff to file a bond for costs, before a judgment to answer over has been entered.

2. PLEADING, § 79*—*when plea to jurisdiction invalid.* A plea to the jurisdiction stating as a legal conclusion, merely, that the action is not of such a character as permits the defendant to be sued in the jurisdiction where suit is brought, is invalid.

3. PLEADING, § 79*—*when plea to jurisdiction insufficient.* A plea to the jurisdiction failing to aver that the beneficial plaintiff does not reside in the county in which suit is brought is insufficient.

4. PLEADING—*what is effect of absence of valid plea to jurisdiction.* In the absence of a valid plea to the jurisdiction, the presumption is that the plaintiff is a resident of the county in which suit is brought.

5. PLEADING, § 379*—*when case treated as if oral issues joined.* Where parties voluntarily go to trial without the formation of written issues, the case is treated as if oral issues had been joined.

6. INSURANCE, § 660*—*what constitutes prima facie case in action on policy for death of animal.* In an action on a policy of insurance on a stallion, containing a clause insuring against death or theft and, in another paragraph, restrictions and limitations as to certain causes of death for which the insurer would not be liable, the plaintiff makes out a prima facie case by showing that the animal died, and the burden is then cast on the insurer to show that the cause of death was one not covered by the policy.

7. PRINCIPAL AND AGENT, § 8*—*when relation exists.* In an action on an insurance policy, where it appeared that the application was signed by a party as special agent whose name, as such, was indorsed on the back thereof, and the defendant in a plea averred that such person was its special agent, *held* not error to permit a witness to refer to such person as the defendants' agent.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

8. INSURANCE, § 663*—*when evidence sufficient to show lack of fraud in procuring policy on animal.* In an action on a policy of insurance on a stallion, evidence *held* to show no fraud in the procurement thereof.

9. APPEAL AND ERROR, § 1459*—*when objection to admission of testimony not considered on appeal.* An objection to testimony will not be considered on appeal where the same testimony had been previously received in evidence without objection.

10. INSURANCE—*when provision in policy on animal that it should not be shipped out of State waived.* A provision in a policy of insurance on a stallion, to the effect that he should not be shipped out of the state, *held* waived by issuance of the policy with knowledge on the part of the insurer that he had been shipped out.

11. INSURANCE, § 329*—*when insurer of stallion in foreign State may not contend that law of such State forbids insurance of animals.* Where an application for a policy of insurance on a stallion is made in Illinois and the policy is sent to Iowa to the owner of the stallion, to whom he had in the meantime been shipped with knowledge of the insurer, the insurer cannot defend on the ground that it is against the law of the latter State to insure animals.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

M. S. MEYBERG, BERNE B. COHEN and L. W. BREWER, for appellant.

H. N. RYON and BOYS, OSBORN & GRIGGS, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

This is an action brought by E. B. and F. O. Butler, partners as Butler Brothers, for the use of Thomas Woulf and James Woulf, partners, and afterwards prosecuted for the use of Thomas Woulf, as surviving partner, against the National Live Stock Insurance Company, hereinafter called the company, upon a policy insuring plaintiffs against the death of an imported

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and registered Belgian stallion. After various pleadings, hereinafter stated, there was a jury trial and a verdict and a judgment for plaintiffs for $1,500, from which the company appeals.

Appellant was organized under the laws of the State of Indiana. Butler Brothers live in Iowa. Thomas and James Woulf lived in LaSalle county, Illinois, and the suit was brought there. The company filed a plea similar to that which, in *Pooler v. Southwick,* 126 Ill. App. 264, we called "A plea to the jurisdiction of the court in the nature of a plea in abatement." Appellees demurred thereto and the demurrer was sustained. Thereafter appellant demurred to the declaration and afterwards filed pleas in bar. It is argued that the court erred in sustaining a demurrer to the plea to the jurisdiction. Appellees contend that appellant waived that plea by pleading to the merits. It was so held in *Delahay v. Clement,* 3 Ill. (2 Scam.) 575, but that decision was overruled on rehearing in *Delahay v. Clement,* 4 Ill. (3 Scam.) 201. The latter decision has been adhered to in *Weld v. Hubbard,* 11 Ill. 573; *Drake v. Drake,* 83 Ill. 526; *Brotherhood of Firemen v. Cramer,* 164 Ill. 9; *Union Mut. Acc. Ass'n v. Riel,* 38 Ill. App. 414; *Galveston City Ry. Co. v. Hook,* 40 Ill App. 547; *Harkness v. Hyde,* 98 U. S. 478. See 1 Corpus Juris, 273, sec. 599, and note 26; 1 Cyc. 136, 137, note 47. The reason given for the rule is that where the defendant pleads over it is in response to a judgment *quod respondeat ouster.* In this case, after the demurrer was sustained to the plea to the jurisdiction, appellant made a motion to dismiss the suit because no bond had been filed to protect the nominal plaintiff, and a motion for a rule on the plaintiff to file a bond for costs, and these motions were before the court ruled appellant to plead. It might be contended that these motions, made before a judgment to answer over had been entered, waived the plea to the jurisdiction, but

we conclude it should not be so treated under the principles laid down in *Kamp v. Bartlett*, 164 Ill. App. 338. We therefore conclude that the action of the court in sustaining the demurrer to the plea to the jurisdiction is before us for decision. The substance of the plea was that at and before the time of the commencement of the suit appellant was and from thence hitherto has been and still is a resident of the State of Indiana, and a corporation organized under the laws of that State; that its place of business is Indianapolis, Indiana, and not LaSalle county, Illinois; that Butler Brothers were then and thence hitherto and still are residing in Emmett county, Iowa, and not in LaSalle county, Illinois; that it has been sued out of the county where it resides, and that it was not found or served with process in LaSalle county, but was found and served with process in Sangamon county, Illinois; that said action does not relate to real estate situated in La Salle county, and that "The said action so brought against it is not of such a character as comes within the exceptions provided by the statutes of the State of Illinois permitting suit to be so brought." We are of opinion that the language above quoted makes said plea invalid. The court has no means of knowing what facts the pleader relied upon as excluding this cause from the operation of said exceptions. Appellant stated its own legal conclusions only. It should have stated the facts relied upon and then the court could have determined whether the legal conclusions of the pleader were correct. We are disposed to hold the plea insufficient for another reason. The plea states nothing as to the place of residence of the beneficial plaintiffs. The policy declared upon is for $1,500 and it showed that the beneficial plaintiffs held a mortgage upon said horse for $1,800 and that they are entitled to the entire amount of the policy if a recovery is had. The nominal plaintiff cannot arrest or discontinue the suit

except on a failure of the beneficial plaintiff to secure him against liability for costs. *Sumner v. Sleeth,* 87 Ill. 500. The statute provides that if the nominal plaintiff dies, the suit does not abate nor survive to the legal heirs or representatives of the nominal plaintiff. The defendant may establish a set-off against the beneficial plaintiff. *Rothschild v. Bruscke,* 131 Ill. 265. If the beneficial plaintiff is a nonresident of the State, he can be compelled to give security for costs. *Smith v. Robinson,* 11 Ill. 119. The beneficial plaintiff may obtain a change of venue. *Jenkins v. Pope,* 93 Ill. 27. The beneficial plaintiff is a party to the suit. *Boynton v. Phelps,* 52 Ill. 210. In these and other cases he is called the real party plaintiff. The plea said nothing as to the residence of the beneficial plaintiffs. Section 7 of the Practice Act (J. & A. ¶ 8544) is as follows:

"The courts of record of the county wherein the plaintiff or complainant may reside, shall have jurisdiction of all actions hereafter to be commenced by any individual against any insurance company, either incorporated by any law of this State, or doing business in this State. And all process issued in any cause commenced in the county wherein the plaintiff may reside, wherein an individual may be plaintiff or complainant, and any such company defendant, may be directed to any county of this State for service and return."

The presumption against the pleader is that the beneficial plaintiffs resided in the county of La Salle and they therefore had the right to bring the suit in that county.

The first plea was nonassumpsit. The second, third and fourth pleas set out the application for said policy and averred that the statements in said application were warranties and were untrue. The second plea averred that said stallion did not cost appellees $2,500, as in said application stated. The third plea averred

that said stallion was not worth $2,500, as in said application stated. The fourth plea averred that said stallion did not serve the number of mares, nor get the percentage of colts in said application stated, and that said horse had not been in the locality stated for the time stated, and that the sums received for his services were not as great as stated in the application. The fifth plea averred that the policy was obtained by fraud, and set out the alleged fraud in detail. The sixth plea alleged that appellant's special agent, who took the application, put a fictitious value upon the stallion, etc. Afterwards four other pleas were filed, of which the first alleged that appellees had other insurance upon the horse, contrary to the statement in the application. The second additional plea alleged that the death of the horse was not caused by any peril covered by the policy. The third additional plea alleged that the horse was removed from the State in which he was insured, in violation of the policy. The fourth additional plea alleged that the horse was in Iowa when insured and that appellant could not lawfully insure animals in the State of Iowa. Replications were filed to some of these pleas and not to others. It may be that if appellant had been compelled to go to trial without issue joined on all said pleas, such action might have been erroneous, but the record shows that the cause was set for trial by agreement of the parties. Where parties voluntarily go to trial without the formation of written issues, the case is treated as if an oral issue had been joined. *Strohm v. Hayes,* 70 Ill. 41; *Schreffler v. Nadelhoffer,* 133 Ill. 536-547; *Kaestner v. First Nat. Bank of Chicago,* 170 Ill. 322; *Devine v. Chicago City Ry. Co.,* 237 Ill. 278; *Supreme Court of Honor v. Barker,* 96 Ill. App. 490; *Anderson v. Patty,* 168 Ill. App. 151; *Ryan v. McGirr,* 168 Ill. App. 415.

In passing upon the merits, it is to be noted that the

application as set out in the pleas is not fully copied therein, but it is in evidence. Appellant contends that appellees did not prove that the horse met his death from any causes insured against. The policy insured appellees "against loss by death or theft to the amount of $1,500, on the following described live stock." This is followed by a description of this particular animal. In a later paragraph, and apparently in fine print, are limitations or restrictions as to the causes of death against which said policy should run. We are of opinion that appellees made a case when they proved the loss of this animal by death, and that if appellant claimed that the death was not within the limitations the burden was upon it to prove that fact. *Clay Fire & Marine Ins. Co. v. Wusterhausen,* 75 Ill. 285. The rule is thus stated in *Knickerbocker Ins. Co. v. Tolman,* 80 Ill. 108: "The general rule is, that, where a right is conferred by a clause, absolute and unconditional in its terms, but the right is limited in a subsequent clause by a condition or exception, the pleader is not required to negative the condition or exception, but it is for the defense to plead it." *Scottish Nat. Ins. Co. of America v. Adams,* 122 Ill. App. 471. The proof was that the horse was left in a commodious and proper box stall in good health and condition about 11 a. m., and about 6 p. m of the same day was found dead in said stall. No evidence was introduced to support the plea that he did not die from any of the causes specifically indicated in the fine print of the policy.

The proof was positive and uncontradicted that this horse cost Butler Brothers $2,500; that he was then worth $2,500; that Butler Brothers bought the horse of Thomas and James Woulf for $2,500 and paid them $700 in cash and executed two notes for $900 each for the rest of the consideration, payable at certain specified dates, and secured said notes by a mortgage upon the horse, and by this insurance which was immediately applied for; and that there was not between But-

ler Brothers and their vendors any private agreement in any way lessening the amount which they were to pay therefor.

It is contended that the court erred in permitting a witness to speak of James Woulf as the agent of the insurance company. The application is signed not only by the two Butlers but also by "James Woulf, special agent," over a statement at the foot of the application as follows: "Agent must sign his name here." Among the indorsements on the back of the application, obviously placed there by appellant or its agent, is "James Woulf, agent, Streator, Illinois, R. F. D. No. 8." One of the special pleas by appellant averred that James Woulf was a special agent of the defendant company for the purpose of taking applications for insurance. The proof is clear from various sources that James Woulf was the agent of appellant and that he did take and fill out this application, and there was no error in the respect suggested. The application showed that Thomas and James Woulf sold this horse to Butler Brothers for $2,500, of which $700 was cash and $1,800 in notes, payable to Thomas and James Woulf, and that their address was Streator, Illinois, so that the company had full knowledge therefrom that their agent and his brother had just sold this horse to Butler Brothers. The interest of their agent in this application, which he took, was fully revealed, and there is no evidence of any fraud between Butler Brothers and James and Thomas Woulf. The statements therein, as to the number of mares served by this horse in the last two preceding years and percentage of colts therefrom, obviously would not have been known to Butler Brothers, but must have been obtained from appellant's agent, and any one reading the application carefully would see that those statements must have been furnished by the agent and not by the applicant. Those statements were proved to be

true, save in one respect. The application, when introduced in evidence, stated that said horse had served 160 mares during the last preceding year; in fact, it had only served 100 mares. Woulf testified that when that application was written and signed it read "100 mares" and that some one had since changed it to 160. Appellant objected to this answer near the close of his examination, but the witness had previously testified to the same fact without any objection, so that that fact was in evidence without objection some time before any objection was made, and therefore we are not called upon to determine whether such proof, if objected to, was competent without any pleading alleging such alteration.

The horse was sold to Butler Brothers in La Salle county, Illinois, for the purpose of immediately shipping him to Estherville, Iowa. This application was immediately prepared and forwarded to appellant at Indianapolis, and the next day the horse was shipped to Iowa and was in Iowa when the policy was afterwards issued. The application revealed to appellant that the horse was to go to Iowa, not only by the fact that the residence of Butler Brothers in Estherville, Emmett county, Iowa, was stated in the application, but also that it stated that the nearest veterinarian was resident in Estherville. Not only did the agent of the company know that it was immediately to be shipped to Iowa and assent thereto, but the company knew by the application that the horse was going to Iowa, and appellant sent the policy to Butler Brothers, Estherville, Iowa. He was removed to that State before the policy was issued, and with the knowledge of appellant and its agent. When the policy was in fact issued the horse was in Iowa, and he was never removed from that State. If the laws of Iowa forbid appellant to insure animals in that State, nevertheless it did make the contract and receive the consideration

with full knowledge that the horse was to be in Iowa.

We find no reversible error in the record, and the judgment is therefore affirmed.

Affirmed.

Frank F. Follett, Administrator, Appellee, v. Illinois Central Railroad Company, Appellant.

Gen. No. 6,212.

1. RAILROADS, § 634*—*when operation of engine backwards without light in front at night in violation of ordinance constitutes negligence.* In an action against a railroad company for death, the defendant *held* guilty of negligence in running a locomotive backwards over its tracks within city limits in the nighttime without displaying a light on its advancing end, in violation of an ordinance.

2. RAILROADS, § 641*—*when backing of train over crossing without warning constitutes negligence.* Backing a train across a much-traveled street crossing, in the nighttime, without ringing a bell or having the crossing guarded by a trainman with a lighted lantern, or by a flagman, *held* negligent.

3. RAILROADS, § 640*—*when backing of train over crossing at excessive speed constitutes negligence.* Backing a train across a street crossing at a speed in excess of that allowed by city ordinance is negligent.

4. APPEAL AND ERROR, § 1245*—*when party procuring exclusion of competent evidence may not complain of failure to establish due care.* In an action for death where competent evidence as to the sobriety, cautiousness, industriousness, prudence and carefulness of the deceased was ruled out on the defendant's objection thereto, *held* that the defendant could not be heard to argue on appeal that the plaintiff was not in the exercise of due care at the time of his death.

5. RAILROADS, § 661*—*when person about to cross track has right to rely upon obedience of ordinance in operation of train.* One about to cross a railroad at a street crossing has a right to rely upon the railroad's servants obeying city ordinances in the operation of its trains.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

6. DEATH, § 46*—*what may be considered on question of due care in action for death.* In an action for death the jury may, on the question of due care on the part of the deceased, consider the instinct common to man, prompting to the preservation of life and avoidance of danger.

7. DEATH, § 73*—*when instruction need not contain requirement that jury should find that deceased was in exercise of due care.* In an action for death due to defendant's negligence, an instruction relating solely to the measure of damages need not contain the requirement that the jury should find that the deceased was in the exercise of due care.

8. DEATH, § 67*—*when verdict for not excessive.* A verdict for $7,000 for the death of an able-bodied man thirty-six years old, earning $924 per year, and having at the time of his death a wife and three children, aged five, four and three years, respectively, *held* not excessive, where, though his family had gone to a foreign country, there was no evidence that he had ceased to support them.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 24, 1916. *Certiorari* denied by Supreme Court (making opinion final).

STEAD, WOODWARD & HIBBS, for appellant; JOHN G. DRENNAN, of counsel.

BUTTERS & CLARK, R. C. DONOGHUE and HOWARD H. BAYNE, for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On May 17, 1913, after 9 p. m., an engine of the Illinois Central Railroad, backing one freight car across First street in the City of La Salle, ran down and killed Kasper Zemlik and Anton Mes. Zemlik left a widow and three children. His administrator brought this suit against the railroad company to recover damages occasioned to his next of kin by the death of said Zemlik, and on a jury trial had a verdict for $7,000. A motion for a new trial was denied, plaintiff had judgment on the verdict and defendant below appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appellant operates a single track railroad through the City of La Salle. On the evening in question freight No. 152 came to La Salle from the south and stopped upon the bridge over the Illinois River. A short distance north of the bridge were coal chutes next west of the main track. Some distance north of that was First street. Further north on the west side of the track was the passenger station and still further north was a water tank, and beyond that were what were known as the Wallace yards. At First street, and for some distance north and some distance south of that and east of the main track, was what was called the passing track, and further east were three switch tracks and also, according to some of the witnesses, one or two spur tracks. First street was at least eighty feet wide. In the middle of the street was a plank crossing, beginning west of the main line and extending east of the east switch track, by which teams were enabled to go across the tracks. Some witnesses testified that this plank crossing was a single length of planks and the crossing was nine or ten feet wide. Others testified that there were two rows of planks abutting against each other and making the plank crossing about twenty feet wide. One witness thought it wider even than that. If the plank crossing was twenty feet wide and in the center of the street and the street was eighty feet wide, then from the south line of the plank crossing to the south line of the street was about thirty feet. A flagman's shanty stood in the street towards its south line and several feet west of the main line. Some of the witnesses spoke of the plank crossing as if that were the entire street, but other evidence shows the width of the street as above stated. The night was dark and the moon was in its first quarter, and behind clouds. There was an arc light burning about fifteen feet west of the railway, its obvious purpose being to light the plank crossing. At

the time in question a switch engine was switching freight cars back and forth over First street upon the switch tracks and the passing track. It was headed north, so that its headlight was thrown only to the north. While one or two of the crew testified that just before the accident this switch engine stopped south of First street and stood there at the time of the accident, the great preponderance of the evidence is that it pushed cars north over First street and stopped there just before the accident, and that it had had that crossing blocked for fifteen or twenty minutes by its work back and forth across that street. The engine of train No. 152 left most of its cars upon the bridge, and the engine, headed north, took a cut of cars north to the Wallace yards and there left all but one car and then backed down to the water tank and took water. It then gave several sharp whistles as a notice to the men in charge of the coal chutes that the engineer wished to take coal, and then ran down from the water tank to the coal chutes. As it crossed First street some one gave an alarm to the engineer and he stopped and they found the engine had run over Mes. When his body had been removed in an ambulance, the engine and car went on down to the coal chutes. Then the hat of another man besides Mes was found and the remains of Zemlik were discovered scattered along the right of way. Blood and indications that some object had been dragged in the cinders with which the track was ballasted began about twenty feet south of the plank crossing.

Plaintiff filed a declaration containing four counts, and later filed four additional counts, and the case finally went to the jury on the original declaration and the first and second additional counts. The first count charged that appellant's servants so negligently drove and managed said locomotive and car that Zemlik was thereby killed while walking across the railroad. The

second count charged that appellant failed to comply with the statute requiring railroads to cause a bell to be rung or a whistle to be sounded beginning at eighty rods from the place where a railroad intersects a public highway, and to keep the same ringing or sounding until the highway is reached, and that by that failure the death was caused. The third count charged that many people constantly crossed the railroad upon that street, and that this made it the duty of appellant to station a flagman at said crossing or to provide some other means of warning people traveling along said highway, and that this was not done, and that this omission was negligence and caused the death of Zemlik. The fourth count charged that the locomotive and cars were driven over said street at a greater speed than was reasonably safe at that place, and that said speed was negligent and dangerous, and caused the death of Zemlik. The first additional count set up an ordinance of the city, forbidding that any locomotive engine attached to any freight car should be driven upon any railroad track in that city at a greater rate of speed than six miles per hour, and charging a violation of said ordinance and the consequent death of Zemlik. The second additional count set up an ordinance of said city, requiring a locomotive engine or railroad car, running in the nighttime, on any railroad track in said city, to have and keep while so running a brilliant and conspicuous light on the advancing end of such engine or car, and a violation of this ordinance and the consequent death of Zemlik. Each count alleged due care by deceased for his own safety. The plea was the general issue. The ordinances so declared upon were in evidence. This engine headed north and, with its headlight showing to the north, was backing south with one freight car ahead of it, and it had no light of any kind on the advancing end. It therefore was guilty of negligence by its violation of

said ordinance, as charged in the second additional count. Zemlik and Mes lived east of the railroad, as did many other people, and had been down to the center of the town, about one mile west, that evening and were returning home. They were evidently stopped by the street being blocked on the switch tracks by the switch engine at work there. Witnesses saw two men standing on or near the main track a few minutes before the accident, and these were evidently Zemlik and Mes waiting until the switching crew gave them an opportunity to cross over. The jury could reasonably find that if the ordinance requiring a conspicuous light on the advancing end of the freight car had been obeyed, they would have been warned thereby of the approach of the car and would have escaped injury. Appellant makes no answer to this charge of negligence. In *Ehrlich v. Chicago Great Western R. Co.*, 160 Ill. App. 379, we cited authorities from which we drew the conclusion that the absence of a headlight from a moving train in the nighttime tended to show negligence in the operation of the train. We see no reason why this rule should not be applied to a freight train moving backwards in the nighttime without a light on its advancing end. *Chicago & A. R. Co. v. Garvy*, 58 Ill. 83; *Lake Erie & W. Ry. Co. v. Zoffinger*, 107 Ill. 199; *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 369; *Chicago, M. & St. P. Ry. Co. v. Walsh*, 157 Ill. 672; *Baltimore & O. S. W. Ry. Co. v. Alsop*, 71 Ill. App. 54; 33 Cyc. 958. This proof therefore tended to make a case under the first count of the declaration, which charged negligent operation of said locomotive and car. The blasts of the engine whistle to give notice to the operator of the coal chutes were not a compliance with the statute concerning the ringing of a bell or the blowing of a whistle in approaching a highway crossing. No engine bell was rung by hand as the crossing was approached, but the engineer testified that before his engine left the water tank he

started an automatic bell thereon and that it rang continuously until the engine stopped after the accident. He was corroborated by some other witnesses, who testified that the bell was ringing as the engine went south over the street. A preponderance of the witnesses who were in that vicinity at the time testify to the effect that they heard no bell ringing. Some of these witnesses were disinterested. If the jury had found a special verdict that the bell was not ringing as the engine backed south, it could not have been set aside on the ground that it was unsupported by the proof. Appellant produced proof that one of the train crew went south to the crossing, carrying a lighted lantern, and gave a signal to the engineer to back up across the street, but the preponderance of the evidence seems to be that no man carrying a lighted lantern was on that crossing just before the accident. If no bell was rung and if the trainman did not guard the crossing with a lighted lantern, then another element of negligence was established. Although there was a flagman's shanty on the south side of the street and west of the railroad, no flagman was on duty that night, and there was evidence that people and teams were crossing the railroad on that street almost constantly, and the jury might reasonably have decided therefrom that under those conditions it was negligence not to have that crossing guarded by a flagman at night. Some of the trainmen testified that this engine went across the street at a speed of three or four miles per hour, but the apparent preponderance of the evidence is that the speed was in excess of that permitted by the ordinance, and, if so, another ground of negligence was established against the company. Appellant does not seriously contend that it was not negligent or that its negligence did not contribute to the death of deceased.

Appellant contends, as its chief ground for a reversal of the judgment, that appellee did not show that

Zemlik was in the exercise of due care for his own safety, and that it affirmatively proved that he was not in the exercise of such due care. Appellee introduced evidence that Zemlik was a careful man, and the court excluded it, and that he was not a drinking man, and this was permitted to stand. He then sought to show by witnesses who had known Zemlik for a number of years that he was a careful, prudent, cautious, sober and industrious man. Appellant objected to this evidence and the court sustained the objection and this evidence was thereby kept from the jury. Appellant argues that this evidence was not competent. No one saw Zemlik and Mes struck or killed. No one knows exactly where they were when they were struck. Two men, evidently these two, were seen at the crossing before the engine started south. It was shown that they were on their way home, and it is evident that they stopped because the side tracks were blocked by the work of the switching crew, one of whom testified that just before this engine started south the switch engine and the various cars it was handling had blocked the crossing for fifteen or twenty minutes. Appellant contends that it proved that, when so seen, they were standing between the rails of the main track. One witness did so testify, and another is made to appear so to testify by the abstract, but an examination of his testimony in the record shows that he did not so state, and another stated that he did not know whether they were between the rails or not, and still others only located them at or about the crossing. The case of *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, is much like this case. There plaintiff's intestate was killed upon a street crossing while going towards home by his usual route. He was last seen a minute before he was struck, standing on the crossing between the rails of the west track and waiting for the passage of a train on the east track. The court said that it was reasonable to suppose that his attention was directed to the train which

obstructed his way and that he expected no train on the west track while the other train was standing in front of him, and that the evidence tended to show that he was acting reasonably in pursuance of his purpose to go home as men ordinarily act under like circumstances. The court said that the fact that he was standing between the rails was a circumstance to be considered by the jury with all other facts in determining whether he used ordinary care, but was not conclusive proof of negligence; that he had a lawful right to be upon any part of the crossing, and whether, under all the circumstances, he exercised proper care for his personal safety in being between the rails was a question of fact. It was there held that proof that he was a sober, industrious man, possessed of all his faculties, also tended to prove that he was in the exercise of proper care, and that when no one saw the killing, due care may be inferred from the circumstances. In *Chicago, B. & Q. R. Co. v. Gunderson,* 174 Ill. 495, where plaintiff's intestate was killed by being struck by a moving train while he was upon the railroad track, the court held, as competent, proof that he was a steady, sober and industrious man, in good health and so situated that it was fairly inferable that the instincts of self-preservation were as strong in him as in other men, and it held that these facts of themselves largely tended to prove that he exercised due care. In *Illinois Cent. R. Co. v. Prickett,* 210 Ill. 140, plaintiff's intestate was killed by the explosion of his engine, and no other person was in the cab so that he could see the acts and conduct of the engineer, except the fireman, who was also killed by the explosion. Other witnesses saw the engine explode but they could not see what the deceased did at the time of and immediately before the explosion. The court held that proof was properly admitted to show the general reputation of the deceased as a careful and competent engineer and a sober man, and that such testimony

tended to show that he exercised ordinary care at the time of the explosion. The same rule has been followed in numerous other cases. Appellant cites cases in answer to this, but we do not find them applicable so far as they use any different language. In reality they confirm what was said in the cases which we have cited. If the proof now under discussion had been admitted it would under these authorities have tended to prove that Zemlik was in the exercise of due care at the time he was struck, and it may be the jury would have considered it sufficient proof of that allegation in the declaration. Appellee was prevented from having the benefit of this proof by the objections and motions to exclude made by appellant. "Appellant cannot be heard to object that a fact was not proved where the proof was prevented by his objection." *Hahl v. Brooks,* 213 Ill. 134; *Chicago & A. R. Co. v. Walker,* 118 Ill. App. 397, 402, and cases there cited; *American Ins. Co. v. Meyers,* 118 Ill. App. 484; *Rock Island County v. Rankin,* 118 Ill. App. 499; *Home Building & Loan Ass'n v. McKay,* 118 Ill. App. 586. Therefore appellant cannot be heard to argue here that the evidence does not show that Zemlik was in the exercise of due care. But, aside from that, when all the evidence is considered, we think the jury were warranted in finding for appellee on that subject. The switch engine and the various cars it was moving were passing back and forth across this highway over which he wished to travel. The switch engine was bumping into cars frequently, and it made much noise in reversing from time to time. All this tended to distract the attention of Zemlik from the engine standing on the main track north of him. Zemlik also had a right to rely upon appellant to obey the city ordinances. *Illinois Cent. R. Co. v. Gilbert,* 157 Ill. 354; *Baltimore & O. S. W. Ry. Co. v. Then,* 159 Ill. 535; *East St. Louis Connecting Ry. Co. v. Eggman,* 170 Ill. 538; *Dukeman v. Cleveland, C., C. & St. L. Ry. Co.,* 237 Ill. 104; *Elgin*

City Banking Co. v. Chicago, M. & St. P. Ry. Co., 160 Ill. App. 364, 375. He had a right therefore to rely upon it that no engine or car would approach that crossing in the nighttime without a conspicuous light upon its advancing end and without the blowing of a whistle or the ringing of a bell, and that no engine with a freight car would come to that place at a greater speed than six miles per hour. In determining this question of due care the jury had a right to consider also the instinct common to man, prompting to the preservation of life and the avoidance of danger.

Complaint is made of the second instruction, given at the request of appellee, which was to the effect that if the jury found the defendant guilty of the negligence charged and that the same resulted in the death of Zemlik, then plaintiff was entitled to recover for the benefit of the widow and next of kin such damages as the jury considered from the evidence just compensation for the pecuniary injuries, if any, which the evidence shows that the widow and next of kin sustained by reason of said death. It is contended that this omits the element of due care. We regard such an instruction as open to criticism, and would much prefer an instruction which began: "If you find for the plaintiff under the evidence." But from an early day the Supreme Court has held that instructions substantially in this form relate solely to the measure of damages and need not contain the requirement that they should find that the plaintiff or the deceased was in the exercise of due care. Among such cases are *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354; *Elgin, J. & E. Ry. Co. v. Thomas*, 215 Ill. 158; *Bonato v. Peabody Coal Co.*, 248 Ill. 422, and many other cases cited in the foregoing. Under these authorities it was not error to give said second instruction.

It is argued that the verdict was excessive and that for that reason a new trial should have been awarded. Zemlik was thirty-six years old at the time of his death

and was a healthy and able-bodied man. He had an employment at which he worked fourteen days and fourteen nights each month at $2.75 per day or night, which if he worked all the time would bring him $924 a year. He married his wife in LaSalle and left a widow and three children, who at the time of his death were aged five, four and three years. Considering his reasonable expectation of life, no one could say that his widow and children would not have been benefited in the amount of this verdict before the children had reached their majority. The widow and children went to Austria ten months before his death, but there is nothing to show that this was without his consent or that he failed to support them thereafter, and the fact that they had gone to Austria does not seem to us to change their rights in any respect. The jury might have found a less sum as damages, but we cannot say from the evidence that they should have done so, or that they erred in fixing the amount they did.

We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

Elizabeth Pooler, Appellant, v. Pliny C. Southwick, Appellee.

Gen. No. 6,025. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 14, 1916.

Statement of the Case.

Action by Elizabeth Pooler, plaintiff, against Pliny C. Southwick, defendant, to recover damages for personal injuries. From a judgment for defendant, plaintiff appeals.

In June or July, 1904, the plaintiff, Elizabeth Pooler, was riding on a public highway with her niece in a horse-drawn carriage. The horse became frightened by an approaching automobile driven by the defendant, and plaintiff was thrown from the carriage and seriously injured. July 6, 1905, she began this action to recover for that injury and filed a declaration charging only common-law negligence in carelessly and negligently running and operating the automobile upon a public highway. On February 27, 1907, she filed two additional counts to the declaration, declaring upon the Act of 1903 to regulate speed of automobiles (Hurd's Rev. St. 1903, chap. 121, par. 269a). It was provided in that act in section 1 that an automobile should not be driven along any road or highway faster than fifteen miles per hour; in section 2, that when a horse driven upon the road became frightened by the approach of an automobile the driver should bring the machine to a full stop; and in section 4, that in an action for damages proof of the violation of either of those provisions should constitute negligence. She alleged in the first additional count a failure to bring the

automobile to a full stop when the horse began to get frightened, and in the second, the running of the car at a speed in excess of fifteen miles per hour, and otherwise indicated an intention to, in these counts, ground her right of recovery on that statute. The defendant pleaded the general issue to the original (or common-law) count. He demurred to each of the additional counts, which demurrer was overruled. He then pleaded the Two-Year Statute of Limitations to the additional counts on the theory that they each stated a new and different cause of action. A demurrer to this plea was sustained and he abided by the plea. A jury trial followed and resulted in a verdict and judgment for the defendant.

DUNCAN & O'CONOR and BUTTERS & CLARK, for appellant.

BROWNE & WILEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1035*—*what is effect of failure to assign questions as error.* Rulings of the trial court, not assigned as error, will not be considered on appeal.

2. STATUTES, § 159*—*what was effect of repeal of Automobile Act of 1903.* A recovery may be had under the Automobile Act of 1903, in an action begun before its repeal, for an injury sustained while it was in force.

3. WITNESSES, § 278*—*when may be impeached.* When a witness, upon cross-examination, neither directly admits nor denies acts or declarations about which he is questioned, it is competent for the adversary to prove the affirmative.

4. INSTRUCTIONS, § 111*—*when may not ignore counts.* Ignoring valid counts of a declaration in instructions is reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Michael Dinneen, Appellee, v. City of Ottawa, Appellant.

Gen. No. 6,108. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Action by Michael Dinneen, plaintiff, against City of Ottawa, defendant, to recover damages for personal injuries sustained by stepping into a hole in a street near a sidewalk in defendant city. From a judgment for plaintiff, defendant appeals.

Plaintiff was at the time of the injury a man about seventy years old. He had lived in Ottawa a great many years and had been, for a number of years, a member of the city council, his last term of office expiring about eight months before the accident, a part of the time serving as chairman of the street and alley committee, and a part of the time as a member of the sidewalk committee.

At the northwest corner of Columbus and Joliet streets there was a hole, or excavation, near the angle made by the sidewalks where years before a catch-basin for the sewer had been put in there and the hole left open. There was no guard protecting the hole. There would be little danger from it in the daytime. A pedestrian would not fall into it if he kept on the sidewalk as he turned the right angle to cross the street. The accident happened at about eleven o'clock of a dark night. The street was dark at that place. Plaintiff was walking north on Columbus street and intending to turn at a right angle and go east and walk on Joliet street. He mistook the place, and turned just before reaching the walk, falling into the hole and

thereby receiving the injury complained of. The ground was hard and level at the place where he turned, and he thought he was still on the walk. He had theretofore been accustomed to walk to his home in this direction on Columbus and Joliet streets, but had habitually used the other side of the street.

RECTOR C. HITT, for appellant.

BROWNE & WILEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1107*—*when knowledge by pedestrian of defect in street question for jury.* In an action against a city by a former member of the council to recover damages for personal injuries sustained on a dark night, as the result of stepping off a sidewalk and falling into a hole in a street, where it appeared that plaintiff had long been accustomed to use such street and thought he was turning at right angles on another intersecting sidewalk, *held* that it was a question for the jury whether plaintiff knew of the hole in the street.

2. ESTOPPEL, § 56*—*when former member of city council not estopped to recover for personal injuries due to defect in street.* A former member of a city council is not precluded from recovery against a city for damages for injuries sustained as the result of stepping off a sidewalk into a hole in the street because of the fact that such defect existed at the time he left office.

3. MUNICIPAL CORPORATIONS, § 979*—*when city guilty of actionable negligence in neglecting to repair or guard excavation.* In an action for damages for personal injuries sustained as the result of a pedestrian stepping off a sidewalk into an unguarded hole in the street, where years before a catch-basin for a sewer had been put in and the hole left open, *held* that the city was guilty of actionable negligence in permitting the excavation to remain in such condition, uncovered and unguarded.

4. MUNICIPAL CORPORATIONS, § 1025*—*when city charged with notice of defect in street.* A city is charged with notice of the existence of an unguarded hole near a sidewalk in the street where such hole has existed for years.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wagner v. Chicago, Rock Island & Pacific Ry. Co., 200 Ill. App. 305.

5. MUNICIPAL CORPORATIONS, § 1107*—*when contributory negligence of pedestrian injured by stepping off sidewalk into unguarded hole in street question for jury.* In an action by a former member of a city council to recover damages for personal injuries sustained on a dark night, as the result of stepping off a sidewalk into an unguarded hole in the street which had existed for years, where it appeared that plaintiff was familiar with the streets, that the hole existed during his term of office as a member of the city council, but that he thought that he had reached an intersecting sidewalk along which he intended to pass, *held* that it was a question for the jury whether plaintiff was exercising ordinary care for his safety.

William F. Wagner, Defendant in Error, v. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.

Gen. No. 6,141.

1. MASTER AND SERVANT, § 98*—*when Federal Employers' Liability Act applies.* The Federal Employers' Liability Act applies only when the carriers and their servants are both engaged in interstate commerce.

2. MASTER AND SERVANT, § 302*—*when defense of assumed risk unavailable.* The defense of assumed risk is unavailable in an action by an employee engaged in interstate commerce, where the injuries are the result of failure to comply with the Federal Safety Appliance Act.

3. MASTER AND SERVANT, § 98*—*when declaration in action under Federal Employers' Liability Act must allege parties engaged in interstate commerce.* In an action by a railroad employee for damages for personal injuries, in order that plaintiff may bring himself within the requirements of the Federal Employers' Liability Act, he must aver in his declaration that the parties were at the time engaged in interstate commerce.

4. PLEADING, § 476*—*when defective and ambiguous allegation cured after verdict.* A defective and ambiguous allegation in a declaration in an action for personal injuries by a railroad employee

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

against a railroad engaged in interstate commerce under the Federal Employers' Liability Act, as to the plaintiff and defendant being engaged in interstate commerce, is cured after verdict.

5. COMMERCE, § 4*—*when evidence sufficient to establish prima facie case that employee engaged in interstate commerce.* In an action by a railroad switching foreman for damages for injuries sustained as the result of his foot being crushed between two loaded foreign cars while attempting to loosen a coupler of one of them by kicking it, evidence *held* sufficient to establish a prima facie case that plaintiff was engaged in interstate commerce.

6. APPEAL AND ERROR, § 1618*—*when error in admitting secondary evidence cured.* Any error in admitting secondary evidence as to the contents of documents without first laying a proper foundation therefor is cured where it subsequently appears that the party offering such evidence caused a *subpœna duces tecum* to issue for such documents and was unable to find them.

7. MASTER AND SERVANT, § 704*—*when noncompliance with Safety Appliance Act proximate cause.* In an action by a railroad switching foreman for damages for personal injuries sustained as the result of his foot being crushed between two cars used in interstate commerce, while attempting to kick loose a defective coupler for the purpose of coupling such cars, evidence *held* sufficient to show that the failure of the railroad company to comply with the Federal Appliance Act contributed to and was the proximate cause of the injury to plaintiff.

8. MASTER AND SERVANT, § 801*—*when instruction stating Federal statute in action under Federal Employers' Liability Act correct.* In an action under the Federal Employers' Liability Act by a railroad switchman engaged in interstate commerce, for injuries sustained due to a defective car coupler, an instruction stating the Federal statute approved.

9. EVIDENCE, § 74*—*when evidence as to defective condition of coupler on car other than one alleged to be defective admissible as part of res gestæ.* In an action under the Federal Employers' Liability Act by a railroad switchman, for damages for injuries sustained as the result of the crushing of his foot while attempting to kick loose a defective coupler on one of two cars engaged in interstate commerce, which he was attempting to couple, evidence as to the defective condition of the coupler on the other car *held* admissible as part of the *res gestæ*, although the condition of the coupler of the other car was alone complained of in the pleadings.

10. EVIDENCE, § 74*—*when evidence as to manner of cars being coupled coming together admissible as part of res gestæ.* In an ac-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tion under the Federal Employers' Liability Act for damages for personal injuries to a railroad switchman, sustained as the result of the defective condition of a coupler on one of two interstate cars which he was attempting to kick loose for the purpose of coupling the cars, *held* that evidence as to the manner of the cars coming together was admissible as part of the *res gestæ*.

11. EVIDENCE, § 148*—*when plaintiff may exhibit injured limb to jury in action for personal injuries.* In an action for damages for personal injuries to a leg of a person negligently caused, it is permissible for the plaintiff to exhibit the injured limb to the jury.

12. DAMAGES, § 122*—*when verdict for injury to foot of railroad switchman not excessive.* In an action by a railroad switchman under the Federal Employers' Liability Act for damages for injury to his foot while attempting to kick loose a defective car coupler, *held* that a verdict for $8,000 was not excessive.

13. APPEAL AND ERROR, § 1772*—*when judgment not reversed.* A judgment will not be reversed for slight errors.

14. MASTER AND SERVANT, § 430*—*when defense of contributory negligence unavailable.* In an action under the Federal Employers' Liability Act, the defense of contributory negligence is unavailable where the injuries are the result of the failure to comply with the Federal Safety Appliance Act.

15. MASTER AND SERVANT, § 567*—*when presumed that railroad performing duty to deliver car to destination at time of injury to employee.* In an action under the Federal Employers' Liability Act by a railroad switchman for damages for personal injuries sustained while attempting to kick loose a defective coupler on one of two cars alleged to be in use in interstate commerce, where it appeared that the car with the defective coupler was on a side track and was partly unloaded, but that plaintiff was about to move it to the building of the consignee where it was to be loaded for shipment to another State, *held* that it would be presumed that it was the duty of the defendant to deliver the car to the consignee and that defendant was delivering it at the time of the accident, notwithstanding defendant had permitted it to be opened before it reached its final destination.

Error to the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 24, 1916.

WILLIAM D. FULLERTON and A. B. ENOCH, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

FRANK H. HAYES and BUTTERS & CLARK, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

August 21, 1912, William F. Wagner, about thirty-six years old, plaintiff below (defendant in error here), was employed by the Chicago, Rock Island and Pacific Railway Company, defendant below (plaintiff in error here), as foreman of a switching crew operating in its yards at Morris, Illinois. In the course of his employment that day he undertook to couple two cars, one of them equipped with a "Major" coupler, and the other with a "Gould" coupler. He had before discovered that the knuckle of the Major coupler was not in working order, and had closed it. It was only necessary to have the knuckle of one of the couplers in order. As the Major car was moved by the engine towards the Gould car he went to the Gould coupler and attempted to adjust the knuckle so that the coupling would be made. The knuckle was defective, and failing to adjust it with his hand he stepped back and kicked the coupler to loosen it. His foot was caught and crushed between the two cars. He brought this action to recover for that injury. The case was submitted to a jury on two counts of the declaration. The first intended to charge negligence arising from a violation of the Federal Safety Appliance Act, the second charging liability under the Federal Employers' Liability Act, and its amendments, but counting on a failure of the defendant to equip a car with such a coupler as is required by the Safety Appliance Act as the cause of the injury. Each count alleged, and the proof showed, that the defendant was engaged in interstate commerce. Whether the declaration sufficiently avers that the plaintiff was at the time and place employed by the defendant in interstate commerce, and whether the evidence shows that to be the fact, are questions much

controverted by counsel. The jury returned a verdict in favor of the plaintiff for $8,000 and the court, after overruling motions by the defendant for a new trial and in arrest of judgment, entered judgment for that amount.

It is obvious if a servant is employed in interstate commerce at any given time and place, his master is also then and there so engaged. But the converse is not necessarily true. The defendant in this case is all the time engaged in interstate commerce, but many of its employees are at different times and places not so employed. The Federal Act applies only when the carriers and their employees are both engaged in interstate commerce. (*Second Employers' Liability Cases*, 223 U. S. 1, 49 [1 N. C. C. A. 875]; *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473 [10 N. C. C. A. 153].) If at the time in question the plaintiff was employed in interstate commerce and his injury resulted from a failure of the defendant to comply with the Federal Safety Appliance Act, the questions of contributory negligence and assumed risk are eliminated. The Federal Employers' Liability Act is quoted in part, and many questions arising thereunder discussed in *Staley v. Illinois Cent. R. Co.*, 268 Ill. 356. It is provided in section 3 of the Act that the employee shall not be held "guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." And in section 4, that the employee "shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is argued that the Federal Employers' Liability Act gives a new right or privilege and that the party claiming such right must bring himself within the requirement of the statute in his pleading; must show

that he comes within the circumstances or possesses the conditions or qualifications named by the statute as requisite to the right or privilege claimed; and *Gillespie v. Fulton Oil & Gas Co.*, 236 Ill. 188, is cited in support of that general rule, and said that under that rule it is imperative that the plaintiff should aver in his declaration, in words or substance, that he was, at the time and place in question, engaged in interstate commerce. We think it true that the declaration must show facts from which it appears that the parties were engaged in interstate commerce. There has been conflict and diversity of opinion in the State courts in relation to necessary pleadings under the statute, as will be seen by reference to Roberts Injuries Interstate Employees, section 150, and following sections, and in *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, language is used which carelessly read might indicate that there could be no recovery without the averment. In that case the pleadings contained no reference to the Employers' Liability Act. The trial court denied the defendant's right to interpose a defense under that act. The United States Supreme Court held that the defendant had a right to disprove liability by showing that the injury had been inflicted while the plaintiff was employed in interstate business, and said: "If without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law;" but it did not say that the case, without amendment, might proceed to judgment for the plaintiff. And in the earlier case of *Brinkmeier v. Missouri Pac. Ry. Co.*, 224 U. S. 268, it was held in an action under the Safety Appliance Act that it was necessary to allege that the car involved was engaged in interstate commerce, and that in the absence of such an allegation the pleadings did not state a cause of ac-

tion under the original act. But it is enough, if it was sufficiently averred, to be good after verdict.

The second count is admitted to sufficiently charge that the defendant was engaged in interstate commerce. After so alleging, it charges the defendant's duty to equip its cars with couplers coupling automatically by impact, and which could be coupled or uncoupled without the necessity of a person going between the ends of the cars to couple or uncouple the same, and its duty not to use or permit to be used on its said railroad cars not so equipped. It then refers to the Act of Congress creating liability in damages to persons suffering injury while employed by such carriers in such commerce resulting from any defect or insufficiency due to its negligence; avers that at the time and place in question the defendant used the car with the defective coupler in question, and adds: "That it then and there became and was the duty of the plaintiff, as such switchman and employee of the defendant engaged in interstate commerce, as aforesaid, at to-wit: the City of Morris, aforesaid, to couple such car so equipped with said defective, broken and inoperative coupler, onto a certain other car then upon the track of the defendant." The clause "as such switchman and employee of the defendant engaged in interstate commerce," may be read signifying that the plaintiff was so engaged, or that the defendant was so engaged. The pleading is ambiguous and would have been bad on demurrer, but we are inclined to hold it good after verdict on the authority of *Sargent Co. v. Baublis,* 215 Ill. 428, and authorities there cited, and other authorities cited by us in *Jacobson v. Ramey,* Gen. No. 6,076, 200 Ill. App. 96; and *Paden v. Chicago, R. I. & P. Ry. Co.,* Gen. No. 6,142, 200 Ill. App. 100. Therefore, the motion in arrest of judgment based on the assumed insufficiency of the declaration was properly overruled.

It is contended that the evidence does not show that

the plaintiff was employed in interstate commerce. He testified that the car with the Major coupler was delivered in the yards on the morning of the accident or the evening before; that it was billed from Tennessee and loaded with cotton seed meal to be delivered to the Quaker Oats people; that the car with the Gould coupler was shipped from Tennessee to the Quaker Oats people and loaded with cotton seed, and was being unloaded and that he was about to move it from where it stood on the track down to the Quaker Oats building, where it was to be loaded for Pennsylvania shipment; that there were then in the yard cars to deal with from all the railroads, the New York Central, the Wabash, the Pere Marquette, and from all over the United States; that the car with the Major coupler was a foreign car. This evidence, if competent, was sufficient to make a prima facie case. *Mattocks v. Chicago & A. Ry. Co.*, 187 Ill. App. 529; *Devine v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 488. In the latter case there was only the testimony that there were some cars in the train going out of the State and some going to points in the State. The Appellate Court said the evidence was slight, but was not contradicted, and held it sufficient. The case was affirmed by the Supreme Court and reported in 266 Ill. 248. But it is claimed that this evidence was not competent because plaintiff testified on cross-examination that he obtained his information as to the origin of the cars from waybills that he inspected in the course of his duty as switchman for the company. The court overruled the defendant's motion to exclude this testimony. Appellee argues that the testimony was competent as a fact coming to the witness' knowledge in his usual course of business, falling within the rule announced in *First Nat. Bank of Decatur v. Priest*, 50 Ill. 321; *Weaver v. Crocker*, 49 Ill. 461, 464; and the *Chicago, B. & Q. R. Co. v. George*, 19 Ill. 510. But we think it unnecessary to de-

termine that question, because it afterwards appeared during the trial that the plaintiff had caused a *subpœna duces tecum* to issue for the production of papers, including such waybills, and the defendant was unable to find them. If this testimony had been first introduced, secondary evidence of the waybills would have been proper when offered, and if it should have been excluded when offered because of the lack of such evidence at that time, the error was cured when it afterwards appeared that the originals were lost.

We conclude that the allegations and proofs each sufficiently show that the plaintiff was employed in interstate commerce; that the failure of the defendant to comply with the Federal Appliance Act contributed to and was the proximate cause of the injury. It follows that under sections 3 and 4 of the Federal Employers' Liability Act there is no question of contributory negligence or assumed risk involved. (*Lucas v. Peoria & E. Ry. Co.*, 171 Ill. App. 1, in which certiorari was denied by the court.)

Plaintiff's second instruction is complained of. It undertook to state the Federal statute and was patterned after a similar instruction that was approved by the court in *Devine v. Chicago, R. I. & P. Ry. Co.*, 185 Ill. App. 488, 496. That case was affirmed by the Supreme Court (266 Ill. 248), and the instruction held good. The reasoning of the Supreme Court in that case applies to the objections raised here. It is argued that the court erred in refusing instructions offered by defendant. We are of the opinion that the instructions, as a whole, presented the law to the jury quite as favorably as the defendant could ask. We find no error in giving or refusing of instructions.

It is argued that the court erred in permitting evidence as to the defective condition of the Major coupler, because it is said it was the Gould coupler that was complained of in the pleadings and the jury's attention should have been confined to that. A similar

question is raised as to the introduction of evidence as to the manner of the cars coming together. This testimoney was a part of the *res gestæ*. It was necessary to describe the occurrence, and how it happened.

It is assigned as error that the plaintiff was permitted to exhibit the injured limb to the jury. Such evidence is permissible. *Chicago Terminal Transfer R. Co. v. Kotoski*, 199 Ill. 383. There are some exceptions and modifications to the rule. The Illinois cases are collected in MacNeil's Illinois Evidence, page 505. We find nothing in the action of the court in that regard contrary to established rules.

It is also argued that the Gould car had reached its destination because it stood on a side track and had been partly unloaded. We assume that the defendant's duty was to deliver it to the Quaker Oats people, and that it was performing that duty, notwithstanding it had permitted it to be opened before it reached its final destination.

It is urged that error was committed in statements of plaintiff's counsel in their argument to the jury. We find no serious error in that respect. There is little controversy about the facts. If we have reached the right conclusion as to the law there is not much doubt of the plaintiff's right of recovery, and slight errors should not affect the judgment. We cannot say from the evidence that the damages were excessive. We find no substantial error in the record, and the judgment is therefore affirmed.

Affirmed.

John Hancock Mutual Life Insurance Company and C. R. Miller, Receiver, et al., Appellees, v. William H. Watson, Appellant.

Gen. No. 6,145.

1. LANDLORD AND TENANT, § 526*—*when landlord renting on shares has title to crop.* Where a landlord is to receive as rent a share of the crop, which is to be delivered to him, he has no title to the crop until it is delivered.

2. LANDLORD AND TENANT, § 526*—*when presumed that landlord has title to crops mortgaged by him.* In the absence of evidence to the contrary, it will be presumed that a landlord who mortgages growing crops has title to them.

3. MORTGAGES, § 134*—*when crops covered by mortgage on land.* Crops growing upon mortgaged lands are covered by the mortgage, whether planted before or after its execution, and until they are severed the mortgage attaches as well to the crops as to the land, and if the land be sold for condition broken before severance, the purchaser is entitled to the growing crops, not only as against the mortgagor but as against all persons claiming in any manner through or under him subsequent to the recording of the mortgage.

4. MORTGAGES, § 134*—*when mortgagor entitled to crops.* Until foreclosure or possession taken by a mortgagee of crops for the breach of condition, the mortgagor is entitled to the crops.

5. MORTGAGES, § 134*—*what interest mortgagee of growing crops receives.* The mortgagor in possession before condition broken cannot, by mortgage, convey to a mortgagee a better title to a greater right in growing crops than he, the mortgagor, has.

6. RECEIVERS, § 18*—*what interest receiver for real estate acquires.* A receiver for mortgaged real property acquires only the rights of the mortgagor therein.

7. MORTGAGES, § 134*—*what does not constitute severance of crops from realty.* The giving of a chattel mortgage upon growing crops does not constitute a severance of the crops from the real estate as between the mortgagee of the crop and the holder of the real estate mortgage on the land.

Appeal from the Circuit Court of Kankakee county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

EDWARD P. HARNEY, for appellant.

DYER & WHITTEMORE and REARICK & MEEKS, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

June 9, 1914, Gertrude Gordon was the owner of 875 acres of farm land in the County of Kankakee, subject to a mortgage of $27,000 to the appellee, John Hancock Mutual Life Insurance Company, and a junior mortgage to another party for $38,700. The land was rented by her in parcels to different tenants at share rent. (The terms of the leasing are not disclosed.) On that day she executed a chattel mortgage to William H. Watson, the appellant, on her interest in acreage of growing crops described as: "½ of 50 acres of timothy meadow; 40 per cent. of 200 acres planted in oats; 40 per cent. of 300 acres planted in corn." Each of these mortgages was properly acknowledged and recorded.

September 4, 1914, a bill was filed to foreclose the junior real estate mortgage. October 31, 1914, the John Hancock Company filed its bill to foreclose the senior mortgage; and on November 5, 1914, the court on petition of the John Hancock Company, appointed appellee, C. R. Miller, receiver for the purpose of collecting the rents, issues and profits of the premises pending the foreclosure proceeding. The mortgage contained an express provision authorizing such appointment and the application of the rents to the payment of the mortgage indebtedness. The receiver immediately qualified and entered upon his duties. Watson got possession of the oats described in his mortgage and sold them about August 21, 1914, and applied the proceeds on his debt, leaving about $560 unpaid, and November 21, 1914, he filed an intervening petition in the foreclosure suit setting out his chattel

mortgage, his right under its terms to take possession of the property if he should feel himself insecure, alleging that there was then unpaid $580 of the indebtedness; that the security was scant and unsafe, alleging that Miller, the receiver, had assumed control and ownership over the crops mentioned in the chattel mortgage, and averring that he, Watson, by virtue of his said chattel mortgage, had a prior lien upon said chattel property, praying that the receiver be ordered to harvest and market the property, and apply the proceeds, so far as necessary, to the payment of the chattel mortgage debt. The receiver answered, denying Watson's prior right. The court, on a hearing, denied the petition, and Watson appeals.

On the hearing it developed that corn described in the chattel mortgage had been harvested and sold for $696.80 after the intervening petition was filed, and the inquiry was directed to the title to this corn. There is no question that the receiver was properly appointed and had full power to act, and no controversy about the facts. In addition to those above stated, appellant testified that the oats were delivered to him for shipment (August 21, 1914) by John Rattin, who was a tenant on one parcel of the real estate, whether the parcel on which the corn was grown does not appear, and that he, appellant, then told Rattin about his chattel mortgage, what property it covered, and asked him to look after the property, and that he did nothing further by way of taking possession of it. There is no evidence that Rattin did anything whatever by way of exercising any acts indicating ownership of appellant except that appellant testified that Rattin looked after the property for him, evidently referring to the fact that he told him to and the assumption that he might have done it. There is nothing in the record that shows, or tends to show, that appellant took possession of the corn in question before he filed his intervening petition.

It is suggested by appellee that Gertrude Gordon had no title to the crop that she mortgaged; that the rule is that when the landlord receives as rent a share of the crop he has no title to the crop until it is harvested. This is true in ordinary cases where rent is paid by delivering a share of the crop. (24 Cyc. 1067.) But there are many kinds of contracts under which tenants occupy land and divide the proceeds with their landlords. (24 Cyc. 1464.) The record does not show whether the several tenants of the land in question were operating under a lease where the share of the crop was to be harvested and delivered in payment of rent. The assumption most favorable to appellant is that Gertrude Gordon owned that part of the crop which she mortgaged to appellant. We will consider the case on that presumption.

Appellant correctly says that the rule is: "That the crops growing upon mortgaged lands are covered by the mortgage, whether planted before or after its execution, and until they are severed the mortgage attaches as well to the crops as to the land. And if the land be sold for condition broken before severance, the purchaser is entitled to the growing crops, not only as against the mortgagor, but as against all persons claiming in any manner through or under him subsequent to the recording of the mortgage." (27 Cyc. 1144.) It is also true, as he says, that until foreclosure or possession taken by the mortgagee for breach of condition, the mortgagor is entitled to the crops. But we think he is in error in assuming from this undoubted statement of the law that the mortgagor in possession before condition broken may, by sale or mortgage, convey to a purchaser or mortgagee a better title to and greater rights in the growing crops than he, the mortgagor, has. We suppose no one would contend that Gertrude Gordon, had she not mortgaged the corn in question, could have prevented the receiver

from taking possession of it and converting the proceeds under his receivership. It is no doubt true that the receiver acquires only the right of the mortgagor in the property, but it is equally true that a mortgagee can take no better title than the mortgagor himself had. It is said in 27 Cyc. 1729: "It has been held, however, that there must be an actual severance of the crop, and that the mortgagor cannot defeat the right of the foreclosure purchaser to the crop by selling it, without cutting, before the foreclosure, nor by giving a chattel mortgage on it." While the author states this proposition as though there might be doubt about it, he cites *Rankin v. Kinsey*, 7 Ill. App. 215, among other cases supporting that doctrine, and the case supports the text. It was reaffirmed by the same court in *Sugden v. Beasley*, 9 Ill. App. 71, 77: "That if the land be sold for condition broken before severance, the purchaser will be entitled to the growing crops, not only as against the mortgagor, but against all persons claiming in any manner through or under him subsequent to the recording of the mortgage." And again in *Yates v. Smith*, 11 Ill. App. 459, the same court, by the same judge, affirmed the right of the purchaser at a foreclosure sale against all persons claiming in any manner through or under the mortgagor subsequent to the recording of the mortgage, citing many authorities. It was held in *Anderson v. Strauss*, 98 Ill. 485, that while between the parties to a judgment the seizure and sale of growing wheat upon execution issued upon the judgment will constitute a severance of the crop from the realty, yet as to a grantee in a deed of trust given by the execution debtor before the execution became a lien, such seizure and sale will not work a severance, and that the purchaser at the sheriff's sale takes subject to the rights of the grantee under the trust deed, which will not be cut off or affected by such sale. If there was no severance of the crop before the receiver was appointed

in the present case, there is no question under the authorities that the court was right in dismissing appellant's petition. Authorities may be found to the effect that a sale or mortgage of a growing crop works a severance and is to be treated as such on contest between the purchaser, or mortgagee of the crop, and the holder of the real estate mortgage on the land. But we are referred to no case in this State so holding, and know of none, and it seems inconsistent with the rule announced in *Anderson v. Strauss, supra.* We are of the opinion that the court did not err in dismissing the petition, and that the order and judgment should be affirmed.

Affirmed.

Richard J. Blemaster, Appellee, v. Thomas Rockey, Appellant.

Gen. No. 6,149. (Not to be reported in full.)

Appeal from the Circuit Court of Stephenson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 24, 1916.

Statement of the Case.

Action in assumpsit by Richard J. Blemaster, plaintiff, against Thomas Rockey, defendant, to recover the market value of his equity in residence property conveyed to defendant under an alleged oral agreement claimed to have not been performed on defendant's part. From a judgment for plaintiff, defendant appeals.

In November, 1910, the plaintiff purchased from the defendant a residence property in the City of Free-

port, and in consideration therefor conveyed him an equity in an eighty acre tract of land in Michigan, and paid him $3,300. Plaintiff obtained a loan of the $3,300 by mortgaging the Freeport property. February 21, 1911, he executed a warranty deed of that property to defendant for an expressed consideration of $4,300. This deed was never recorded, and plaintiff testified that it was executed as a security for a $200 obligation incurred for him by the defendant. In May, 1913, plaintiff executed another warranty deed of the premises, which was delivered to the defendant. The consideration expressed in the deed was $4,500, and it recited that the grantee assumed and promised to pay mortgage incumbrances of $3,300 and $100 respectively. Plaintiff's claim was that this last conveyance was made in pursuance of an oral agreement that he would convey the premises to defendant and pay him $400 in money, and that defendant should assume and pay the mortgage indebtedness and convey to plaintiff the equity in the eighty acre tract of land in Michigan and cancel plaintiff's two notes of $100 and $200, respectively, which defendant had discounted at a bank; that he executed and delivered the deed and afterwards tendered appellant $400, but defendant refused to accept the money and refused to convey the Michigan property, and failed or refused to cancel or cause to be canceled the two notes.

Defendant's claim was that plaintiff was involved in debts and financial difficulties and he was endeavoring to aid him, and for that purpose took the deed of the Freeport property and assumed the mortgage indebtedness thereon that the creditor might have the benefit of his responsibility; that nothing was said about the Michigan land or about plaintiff's paying him $400 at that time; that he had at other times offered to convey the Michigan property for $400, and at one time had a deed executed to be delivered on payment of that sum, but the money was never offered

him; that he held the deed of the Freeport property as a mortgage and there was never any agreement, intent or purpose that it should operate as a conveyance evidencing a bargain and sale. He did not deny plaintiff's statement that the prior deed of February 21, 1911, was intended as a mortgage, but insisted that it operated as an estoppel on plaintiff to claim that the later deed was to convey the title.

The court, at the instance of the plaintiff, gave the jury the following instruction:

"You are instructed that if you believe from a preponderance of all the evidence, that the plaintiff and defendant entered into an oral agreement whereby the plaintiff was to convey to the defendant all his interest in the house and lot in question in this suit, and in addition thereto was to pay the defendant the sum of four hundred dollars and in consideration thereof the defendant agreed to convey to the plaintiff a certain eighty acre tract of land in Michigan, and if you further believe, from a preponderance of all the evidence that the plaintiff did convey the house and lot in question to the defendant and in addition thereto offered to the defendant the sum of four hundred dollars legal tender of the United States of America, and if you further believe, from a preponderance of all the evidence, that the defendant refused to convey to the plaintiff the said eighty acre tract of land in Michigan and refused to accept the said sum of four hundred dollars, then you will find the issues for the plaintiff and assess the plaintiff's damages against the defendant at such sum, if any as you may believe, from a preponderance of the evidence, the fair cash market value of plaintiff's interest in said house and lot in the city of Freeport, at the time of such conveyance thereof, exceeded the incumbrance thereon."

ROBERT P. ECKERT, for appellant.

ELWYN R. SHAW, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. ESTOPPEL, § 33*—*when giving of deed as mortgage does not estop grantor to claim that later deed not mortgage.* The fact that the owner of property gives one deed as a mortgage to cover indebtedness does not estop him from claiming that another deed reciting that the grantee assumes and promises to pay other mortgage incumbrances was not intended as a mortgage.

2. MORTGAGES, § 38*—*when evidence sufficient to establish absolute conveyance and not mortgage of real property.* In an action of assumpsit to recover the market value of an equity in residence property which was conveyed by deed from plaintiff to defendant under an alleged oral agreement not performed by defendant, evidence *held* sufficient to sustain a finding that the deed was intended as an absolute conveyance of the property as claimed by plaintiff, and not as a mortgage, as contended by defendant.

3. DAMAGES, § 66*—*what is measure of for breach of oral contract to convey property.* In an action of assumpsit to recover the market value of an equity in residence property which was conveyed by deed to defendant by plaintiff under an alleged oral agreement by which plaintiff was to convey such property, subject to the mortgages thereon, to defendant and pay a certain sum of money equivalent to three notes against plaintiff which had been held by defendant, but had been transferred to another person, in consideration of the cancellation of such notes and the conveyance of other property, an instruction that if the jury found that the agreement was as stated and defendant refused to perform the contract they should find for the plaintiff and assess his damages at such sum as they believed, from a preponderance of the evidence, the fair market value of plaintiff's interest in such property exceeded the incumbrance thereon, approved.

4. COURTS, 138*—*when cause not transferred to equity side of court.* A vendee sued at law for the purchase price of real estate cannot transfer the action to the equity side of the court by pleading and attempting to prove that the deed was given as a mortgage unless he succeeds in establishing the truth of his statements.

5. ASSUMPSIT, ACTION OF, § 6*—*when lies to recover value of property conveyed under oral agreement.* Where land is conveyed to another under an alleged oral agreement by which the vendor is to convey such property, subject to incumbrances, to the vendee and to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

pay a certain sum equivalent to outstanding notes of vendor's in favor of vendee, in consideration of the cancellation of such notes and the conveyance of other property, the refusal of vendee to convey such other property constitutes a termination of the express contract and authorizes an action in assumpsit to recover on an implied agreement.

6. ASSUMPSIT, ACTION OF, § 89*—*when evidence sufficient to sustain verdict as to value of property.* In an action of assumpsit to recover the market value of residence property conveyed to defendant under an oral contract, which was breached by defendant, evidence *held* sufficient to sustain the verdict as to the value of such property.

7. APPEAL AND ERROR, § 1447*—*when error in refusing leave to file special pleas and in sustaining demurrers to special pleas harmless.* Any error in an action of assumpsit in refusing defendant leave to file special pleas and in sustaining demurrers to special pleas is harmless where defendant is not deprived in the introduction of evidence, or in the instructions to the jury, of any legal right to which he is entitled under the facts.

John C. Wallin, Appellee, v. James A. Mitchell, Appellant.

Gen. No. 6,152.

1. ROADS AND BRIDGES, § 241*—*when instruction on liability for leaving wagon on street misleading.* In an action to recover damages for personal injuries sustained as the result of plaintiff's right leg coming in contact with a wagon and rock left upon a street, but off the graveled portion, while riding on a horse, an instruction that if the jury believed from the greater weight of evidence that the defendant placed, caused, or knowingly permitted his wagon to be placed upon the street, or knowingly permitted and suffered such wagon to remain upon said street as charged in plaintiff's declaration, and that said wagon so being placed or knowingly permitted to remain upon said street was the proximate cause of the alleged injuries to plaintiff, and that plaintiff was injured while in the exercise of due care as the result of such negligence on the part of defendant as charged in plaintiff's declaration in plac-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ing or knowingly permitting said wagon to be or remain upon said street, they should find defendant guilty, *held* erroneous as tending to mislead the jury into believing that if the wagon was within the street lines it was, as a matter of law, a nuisance.

2. MUNICIPAL CORPORATIONS, § 887*—*when fitting entire width of road for travel question for local authorities.* While a whole street is primarily devoted to public use for travel and to that use all other rights must be subordinate, still, whether it is or not necessary to fit the entire width of the road for travel is usually a question for the decision of the local authorities.

3. ROADS AND BRIDGES, § 240*—*when question whether leaving of farm wagon within street lines is nuisance is for jury.* Whether a farm wagon left within street lines is a nuisance and an obstruction to public travel cannot ordinarily be determined as a matter of law, but should be left to the jury under appropriate instructions to find as a matter of fact.

4. TRIAL, § 144*—*when conduct of counsel improper and ground for reversal.* Misconduct of counsel in acting boisterously, coupled with contemptuous treatment of the opposing counsel and witnesses and with disrespect to the court, *held* ground for reversal.

5. ROADS AND BRIDGES, § 239*—*when evidence as to disposition of horse admissible on question of contributory negligence of rider.* In an action to recover damages for personal injuries sustained as the result of plaintiff's leg coming in contact with a farm wagon within the street lines, but off the graveled portion, evidence as to the vicious disposition of the horse and its tendency to balk is admissible on the question of due care of the rider.

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 14, 1916.

McDOUGALL & CHAPMAN, for appellant.

BUTTERS & CLARK and H. M. KELLY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellee, John C. Wallin, and one Pruess, May 18, 1912, after dark, were riding horses along Mill street, a public highway extending through the Village of Utica. Appellee's right leg came in contact with some

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

object at or near the roadside and was broken. He brought this suit against James A. Mitchell, the appellant, charging that the defendant had left a wagon with a rack on the highway, which was a dangerous obstruction to public travel, and the cause of the injury. He had verdict and judgment for $5,000. The defendant appeals.

Utica is a small village, and the street at the place in question has the appearance of an ordinary roadway in the country. It is about sixty-six feet wide, with a graveled roadway twenty to twenty-two feet wide in the center, leaving on each side of the graveled way seventeen to twenty feet within the street limits. Appellant was carrying on quite extensive farming operations in that vicinity, and a wagon and rack was left by one of his servants at the roadside the day before the accident. There is a conflict in the evidence whether it was left four or five feet from the graveled way, or entirely in the field beyond the street line, or at some place between those two points. There were telephone poles at the side of the street, and, as is usual with country roads, the part not graveled did not invite public travel and was not so used.

Appellee's theory supported by evidence introduced by him is that he was riding along the highway in a reasonable manner; that the corner of the hayrack was within three or four feet of the graveled way; that his horse shied and brought his leg against it.

Appellant's theory supported by evidence introduced by him is that appellee and his companion, Pruess, were racing on the highway; that appellee was intoxicated and riding a horse that he knew was vicious and likely to leave the road; that the horse bolted at that place and carried appellee beyond the street line where the wagon was left, or if not beyond the street line to a point so near that line that the wagon was not a danger to public travel. The jury had to determine the questions of appellant's negligence and ap-

pellee's care on very conflicting testimony, and a judgment based on their verdict should not be permitted to stand if there were material errors of law.

The court, at the instance of the plaintiff, instructed the jury: "If they believe, from the greater weight of the evidence, that the defendant placed or caused or knowingly permitted his said wagon to be placed upon the street in question or knowingly permitted and suffered said wagon to remain upon said street as charged in the plaintiff's declaration, and that said wagon so being placed or knowingly permitted to remain upon said street, was the proximate cause of the alleged injuries of the plaintiff, and that the plaintiff, without notice or knowledge of the presence of said wagon there upon said street, and while in the exercise of due and ordinary care for his own safety, was injured on account of said alleged negligence on the part of the defendant as charged in plaintiff's declaration, in placing or knowingly permitting said wagon to be and remain upon said street, then the jury should find the defendant guilty."

In the above instruction "knowingly permitted the wagon to *remain* in the street" is qualified by the words "as charged in the declaration," but "knowingly permitting the wagon to be *placed* upon the street" is not so qualified. If the wagon was within the street lines a very material question was whether it was at such a place as to obstruct travel. The jury were likely to understand from the instruction that if the wagon was within the street lines it was, as matter of law, a nuisance, the instruction should not have been given in that form.

While the whole way is primarily devoted to public use for travel and to that use all other rights may be subordinate, still whether it is or not necessary to fit the entire width of the road for travel must, in the great majority of cases, be a question for the decision of the local authorities. (Elliott on Roads and Streets,

section 491, citing *English v. City of Danville*, 170 Ill. 131.)

Many things may be authorized by proper municipal authorities, which, to a greater or less extent, interfere with the free and entire use of the street, which, if not so authorized would be deemed nuisances. Custom or usage may sometimes sanction an act which would otherwise be deemed a nuisance and relieve it from that construction, *McDonald v. English*, 85 Ill. 232, 235, citing *Nelson v. Godfrey*, 12 Ill. 20, where the court said on page 23 in speaking of the right of an abutter to excavate under the sidewalk for a coal cellar: "As such a privilege is of great convenience in a city and may, with proper care, be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any acts of the corporate authorities to the contrary, they having been aware of the progress of the work." The latter case is cited in *McCormick v. South Park Com'rs*, 150 Ill. 516, 529, where the court said: "Undoubtedly, the owners of lots bordering upon streets or ways have the right to make all proper and reasonable use of such part of the street for the convenience of their lots, not inconsistent with the paramount right of the public to the use of the street in all its parts. (*Smith v. McDowell*, 148 Ill. 51, and cases cited.) In the absence of legislative direction or municipal declaration of what such rights shall be, what is to be deemed a reasonable and proper use will depend, in a large degree, upon the public usage in like instances, and upon the local situation. General use by lot owners, and acquiescence therein by the public and private authorities, may always be resorted to as evidence of what is a reasonable and proper use and of the existence of the right." In *Gregsten v. City of Chicago*, 145 Ill. 451, 461, it is said: "It is the general doctrine that municipalities, under the power of exclusive control of their streets, may allow any

use of them consistent with the public objects for which they are held." Authorities are collected in *Sears v. City of Chicago*, 247 Ill. 204, 216, where it is said: "Whatever may be the rule in other jurisdictions, the law is settled in this State that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held." In *People v. Marshall Field & Co.*, 266 Ill. 609, 623, the court, citing authorities said: "That the owner of abutting premises may make a reasonable use of the street to convey goods from his premises, and for that purpose may place temporary obstacles to travel, such as skids, across the sidewalk." It is clear from the above authorities that whether a farm wagon left within street lines is a nuisance and obstruction to public travel cannot ordinarily be determined as matter of law, but should be left to the jury under appropriate instructions to find as a matter of fact.

Appellant well says that the court erred in not permitting him to prove the character of the horse that appellee was riding after permitting appellee to testify to its disposition. If the horse was vicious and liable to bolt to the side of the street and appellee knew it before he attempted to ride him at that time and place, that fact had some bearing in the consideration of appellee's exercise of care in the manner he was riding.

What, however, seems to us the most serious objection is that appellee's counsel conducted themselves improperly in the trial of the cause. There was much tumult and confusion in the introduction of the evidence, and while ordinarily that is a matter in which the judgment of the trial court should not be reversed because he is in much better position than the reviewing court to know the provocation for doing the things complained of, and the effect upon the jury, still, in this case, the record shows a failure of appellee's coun-

sel to observe rules necessary to a fair investigation of a controversy in a court of law that should not be excused. During the examination of witnesses one of appellee's attorneys said "bosh" to a ruling of the court against him. At another time he, without apparent provocation, told opposite counsel to "shut up." Much occurred that might well be expected from an attorney trying a law suit in the mood that these expressions indicate. His associate was not free from criticism in the manner in which he cross-examined witnesses. The court, at times, admonished counsel with little effect. They excuse themselves here by suggesting the zeal that overcomes attorneys in the quest of truth and desire to suppress falsehood. Good trial lawyers often see their own side of the case very strongly, and in the heat of a jury trial are not able to judge calmly of what the fact is, and what the law is. Witnesses testify to the facts as they understand them, perhaps mistakenly. Opposing counsel contend for the law as they understand it. The jury listen to the facts. The court rules on the law. All parties are entitled to courteous treatment, and nothing is more likely to defeat the ends of justice in the trial of a case than boisterous conduct of counsel, coupled with contemptuous treatment of opposing counsel and witnesses, and disrespect to the court. The fact that counsel for appellee in this case are experienced lawyers and courteous gentlemen, ordinarily conducting themselves with propriety in the trial of cases, should not have deterred the trial court from enforcing order in the court room, and should not influence us to refuse to let a judgment stand that there is much reason to suppose was influenced by such misconduct.

Other errors are assigned and argued. They are of minor character, and, if errors, will probably not occur on another trial. For the reasons above indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

Herbert Heater, Appellee, v. Chicago & Alton Railroad Company, Appellant.

Gen. No. 6,160.

1. ROADS AND BRIDGES, § 11*—*when way by prescription over railroad right of way established.* To establish a public highway by prescription across a railroad right of way connecting the divided portions of a public street, the use of the public must have been adverse, under claim of right, continuous, uninterrupted, with the knowledge of the owner of the estate, and not with the mere acquiescence of the owner, and it must appear that a certain and well-defined line of travel existed over the property for fifteen years.

2. DEDICATION, § 9*—*when dedication of way over railroad tracks not established.* A dedication of a way over railroad tracks connecting the divided portions of a street is not established when it appears that the space is used for switching purposes and the railroad company has simply acquiesced in the use of the tracks as a way by the public.

3. ROADS AND BRIDGES, § 21*—*what does not constitute admission as to existence of street over railroad right of way.* A railroad company which, with other companies occupying parallel tracks, merely accepts an ordinance purporting to vacate a portion of a public street which the railroads' rights of way intersected, as a part of an arrangement by the city to elevate the tracks, does not admit that a street formerly existed over its portion of the right of way at the time of an injury to a pedestrian using such alleged street.

4. ROADS AND BRIDGES, § 23*—*when evidence insufficient to show existence of highway over railroad right of way.* In an action by a pedestrian for damages for personal injuries sustained by a pedestrian while attempting to cross railroad tracks at a point connecting two divided portions of a public street, over which the public had been accustomed to pass, evidence *held* insufficient to establish that plaintiff was injured on a public street.

5. RAILROADS, § 516*—*what duty owed to licensee on right of way.* A mere licensee has no greater rights on a railroad right of way than a mere trespasser, and the only duty the railroad company owes him is not to wilfully or wantonly injure him.

6. APPEAL AND ERROR, § 1300*—*when presumed that record contains all producible evidence as to existence of way across railroad right of way.* Where no street existed at the time of the estab-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

lishment of a railroad right of way, and there is no evidence in the record that the railroad company consented or acquiesced in the establishment of a way over its right of way connecting the divided portions of a public street, it will be presumed on appeal that the record contains all the evidence that could be produced tending to show such consent or acquiescence.

7. APPEAL AND ERROR, § 1802*—*when cause reversed without remanding.* Where the record in an action by a mere licensee for damages for personal injuries sustained while attempting to cross a railroad track presumptively contained all the evidence as to the existence of a way by prescription over the railroad right of way and it was insufficient to establish such way, and there was no evidence that the defendant wantonly or wilfully injured the plaintiff, *held* that the cause should be reversed without remanding.

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed April 14, 1916.

J. L. O'DONNELL, T. F. DONOVAN and J. A. BRAY, for appellant; WINSTON, PAYNE, STRAWN & SHAW, of counsel.

KELLY & ORR, for appellee; PAUL E. PRUTSMAN, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

September 27, 1905, appellee, Herbert Heater, then a boy thirteen years old, while walking across the tracks of the Chicago & Alton Railroad Company, the appellant, was struck by an engine backing towards him. His right leg was cut off below the knee and he was otherwise seriously injured. About eight years later, after he became of legal age, he brought this suit to recover for that injury, and filed a declaration of four counts, each drawn on the theory that he was struck while upon a public street of the City of Joliet.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The charges in different counts are negligence, in general terms, in operating the engine upon said street, failure to comply with an ordinance of the city requiring that a man be stationed at the end of an approaching car to warn people of danger, and another ordinance of the city requiring the right of way of a railroad to be planked where it crosses a street, and suitable grade approaches at the crossing of streets. The general issue was pleaded. A jury trial resulted in a judgment for plaintiff for $1,500. The defendant prosecutes this appeal.

The controlling question is whether appellee was, at the time and place in question, upon a public street, whether he was rightfully at the place, or was a trespasser or a licensee to whom appellant owed no duty except not to wilfully injure him.

Appellant's railroad runs practically north and south through the City of Joliet. It was constructed in 1853. About 1887 the Santa Fe railroad was built with its right of way adjacent to and just east of appellant's. At the time of the accident there was, so far as a view of the ground would show, a public street known as Third avenue, beginning about three-quarters of a mile east of the right of way of these two railroad companies, traveled by vehicles and pedestrians to a point about half a block east of the Santa Fe right of way. Proceeding west there was no visible sign of a street, but there was an embankment from six to ten feet high upon which were laid, first, two tracks of the Santa Fe road, then five tracks of appellant's road, being appellant's two main tracks and three switch tracks. The right of way of the two roads combined was about one hundred fifty feet wide, perhaps one hundred feet used for these seven tracks. There were across this right of way marks of foot travel which some of appellant's witnesses say amounted to a beaten path connecting the two ends of Third avenue. The greater weight of the testimony

shows that there were footprints in various directions above and below, as well as on the space indicated by an extension of the street lines, with no visible defined path connecting the ends of the street. There had been no attempt by the railroad companies to treat the space as a street by way of marks, or signs, or grading, or planking between their tracks, or in any other manner. The space was used by appellant for switching purposes, as well as for the passage of its trains on its main line, and had the general appearance of a railway yard maintained and operated with no reference to public travel therein or thereon. No evidence was introduced that it had ever been dedicated as a public street by a plat or other writing. It is clear that it was not used, and could not be used, for the passage of vehicles, and also clear that there had been some foot travel across the right of way by people approaching from one side or the other on Third avenue, sometimes going straight across and sometimes up and down the tracks. But Third avenue at these adjacent points was not much traveled.

Appellee at the time in question was approaching the right of way from the east on Third avenue. He went up the embankment and proceeded to cross the tracks. After he had crossed the Santa Fe rails and reached appellant's switch track he says he saw an engine north of him headed north, and supposed it was moving north. In fact it was backing south pulling a string of cars from the north. He says he stumbled on one of the rails of appellant's switch track and fell, and the wheels of the tender passed over him cutting off his right foot; that he caught a bar of the engine underneath; that the engine backed south to or near Fourth avenue and then returned and came back nearly to Third avenue, when he attracted the attention of the crew by his cries and he was taken out. None of the engine crew saw him until after they

heard his cries. They stopped south of the south line of Third avenue as they were going north and took him from under the engine; found that his leg had been cut off and went back south about one hundred fifty feet and found the foot and signs of blood and shreds of clothing at that point, and no signs of blood on the track north of where the foot was found. Appellee was probably not within the extension of Third avenue at the time he was injured, but as he testifies that he was in that space at the time he was struck, it is necessary to inquire whether Third avenue can reasonably be held to extend across the right of way. Appellee bases his claim that it did, on the argument that there was a user that established a way by prescription. There is some evidence, as we have before said, that there was sufficient travel from east to west on that space to make a visible beaten path, but the decided weight of the testimony, even that offered by appellee, is that there was no such visible beaten path. It is true, we presume, that a prescribed right of travel across a railway right of way might arise as across other private property, but a prescriptive right could not come from a permissive use. Mere travel by the public is not sufficient to establish a prescriptive right as a user. It must be under a claim of right by the public and not by the mere acquiescence of the owner. (*Palmer v. City of Chicago*, 248 Ill. 201.) Neither can appellant be supposed to have dedicated the strip to public travel because of mere acquiescence in the use here shown for that purpose. (Id.) It is clear, from the use that appellant devoted this space to as a yard for switching cars, that it never intended it to become a public street, and without that intention it cannot be said to have devoted it and dedicated it to that use. (*City of Chicago v. Wildman*, 240 Ill. 215.) To establish a public highway by prescription the use of the public must have been adverse, under claim of right, continuous, uninterrupted and with the

knowledge of the owner of the estate. Occasional travel, such as is shown here, is not sufficient. (Id.) It must appear that a certain and well-defined line of travel has existed over the property for fifteen years. (*City of Chicago v. Galt*, 224 Ill. 421; *Doss v. Bunyan*, 262 Ill. 101, 108.)

Some time after the accident in question, track elevation ordinances were passed by the City of Joliet and certain portions of streets were vacated to enable appellant and several other railroad companies to elevate their tracks in accordance with the provision of the ordinance. Appellee offered in evidence an ordinance of the City of Joliet which purported to vacate a part of Third avenue beginning a few feet east of the Santa Fe right of way and ending a few feet west of appellant's right of way, with proof that appellant accepted this ordinance as a part of its arrangement with the city to elevate its tracks, and argues that this action of appellant is an admission that Third avenue did, before the vacation ordinance, extend across its tracks. Only the ordinance mentioned appears in the record here, but the acceptance offered in evidence was by appellant, the Santa Fe road, and four other railroads. We assume that it was a part of the general plan of track elevation in the city, and that this particular piece of ground was a comparatively small incident. It appears that some time before the accident the city authorities of Joliet had endeavored to make appellant prepare the crossing at that place for public travel, and appellant had successfully resisted. It may well be that any road, wishing to use this space in elevation of its tracks, would desire to relieve the situation of any claim, however unfounded, that there was a public street there. But whatever the motive may have been, it is not reasonable to suppose that appellant intended by joining in the acceptance of the ordinance to admit that there was a public street there. The transaction could only be given that effect and meaning by a

strained, technical construction, which might be well answered by saying that an admission by appellant some time after the accident that a street existed there at the time of the admission did not mean that it existed at the time of the accident.

We conclude that the record entirely fails to show that appellee was on a public street or highway at the time in question, and that the only reasonable construction of the evidence is that he was on the private right of way of appellant. It does not matter so far as the decision of this case is concerned whether he was there as a trespasser or a mere licensee. A mere licensee has no greater rights than a trespasser. The only duty which appellant owed him was not to wilfully or wantonly injure him. (*Cunningham v. Toledo, St. L. & W. R. Co.*, 260 Ill. 589). There is no charge in the declaration, nor claim in the argument, that the action of appellant was wilful and wanton, and we see no ground for such claim. The judgment must be reversed.

We see no reason to suppose that proof could be introduced on another trial showing the space in question to be a public street. There was no street there at the time appellant secured its right of way, nor could have been created there after the time without the consent or acquiescence of appellant, and we presume the proof in this record is all that could be produced tending to show such consent or acquiescence. Therefore the cause is not remanded.

Reversed with finding of facts.

Finding of facts. We find that the place where the injury occurred was not a public street and that the plaintiff in error was not guilty of the negligence charged in the declaration.

Evalyn Kingman, Appellee, v. Louis Kingman, Appellant.

Gen. No. 6,178. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded with directions. Opinion filed April 14, 1916.

Statement of the Case.

Petition filed by Evalyn Kingman, petitioner, against Louis Kingman, respondent, asking for a rule to show cause why the respondent should not be attacked for contempt of court for refusal to pay alimony. From an order entered against him, the defendant appeals.

EVANS & EVANS, for appellant.

ROBERT H. LOVETT and WEIL & BARTLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 109*—*what orders relative to alimony may be made.* The court may, from time to time, make such orders as to the amount of alimony that shall be paid as the exigencies of the case require.

2. DIVORCE, § 110*—*when amount of alimony properly reduced.* Where, owing to financial reverses, the defendant's income had been very much reduced, alimony was reduced from $20 to $5 per week, and an order committing him for contempt for not paying alimony past due, reversed.

3. DIVORCE, § 110*—*when refusal to reduce alimony erroneous.* Refusal of the court to reduce alimony because the defendant was in contempt for failure to pay alimony past due, *held* error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Matthew Donaghue, Appellee, v. Edward J. Fraikin, Appellant.

Gen. No. 6,192. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 12, 1916.

Statement of the Case.

Action by Matthew Donaghue, plaintiff, against Edward J. Fraikin, defendant, to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals.

Matthew Donaghue, the plaintiff, was riding along a public highway north of Ottawa just after dark July 9, 1909, driving a single horse attached to a top buggy. He was in a beaten path a little to the side of the center of the road because the center had been recently graded. As he was passing the premises of Edward J. Fraikin, the defendant, his buggy ran over a cow lying in the road and was overturned. Plaintiff was injured quite seriously. Both bones of his ankle were broken,—a compound, comminuted fracture. He was confined to his house for a long time, suffering considerable pain and incurring considerable expense for doctors' bills. His injuries were to some extent permanent. He brought this action to recover for that injury, and had verdict and judgment for five hundred dollars.

The issues of fact were stated to the jury at the instance of the defendant in the following instructions:

"The court instructs the jury that before they can find the defendant guilty, they must believe, from a preponderance of the evidence,

"First, that the plaintiff received the injuries com-

plained of by him by having his buggy upset or overturned by a cow lying in the public highway;

"Second, that the plaintiff himself was not guilty of a want of ordinary care for his own safety;

"Third, that the defendant was the owner of said cow;

"Fourth, that the defendant carelessly, negligently or unlawfully permitted said cow to run at large on said public highway; and,

"Fifth, that the injury to the plaintiff was one which an ordinary prudent person should have foreseen would likely happen as a consequence of permitting a cow to run at large on a public highway, and unless the jury find from the evidence that the plaintiff has proved each of said requirements by a preponderance of the evidence, the jury should find the defendant not guilty."

The evidence sustained affirmative findings on the first and second propositions. There was a decided conflict of evidence as to the third whether the defendant was the owner of the cow. The evidence showed that he had a number of cows kept on his premises; that at different times before the accident they had been pastured in the road. One witness that appeared at the scene of the accident immediately after it happened testified that there were two cows in the road there that he had before seen in defendant's herd. The doctor that was called to the place said that defendant then and there said he felt sorry to think it was his cow that was the cause of plaintiff's breaking his leg. It was so dark that plaintiff did not identify the cow at the time of the accident, but he testified that he had a conversation with defendant afterwards in which defendant told him that after taking him, plaintiff, home that night he saw two of his cows coming down the road from the north.

GEORGE P. HILLS and BUTTERS & CLARK, for appellant.

E. C. SWIFT and L. W. BREWER, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. ANIMALS, § 43*—*when evidence sufficient to show ownership.* In an action for personal injuries sustained by the plaintiff as a result of his driving over a cow lying in a highway, evidence *held* sufficient to sustain a finding that the cow belonged to the defendant.

2. ANIMALS, § 42*—*when evidence of custom in allowing animals to run at large admissible.* In an action for personal injuries sustained as a result of the plaintiff running over the defendant's cow lying in a highway, where the defendant claimed that a cow which had escaped from its inclosure without the owner's fault was not running at large within the meaning of J. & A. ¶ 322, evidence of a custom of the defendant to permit his domestic animals to run in the highway, and that they had been seen there unattended shortly before the accident, *held* admissible on the question of knowledge and care of defendant.

3. ANIMALS, § 14*—*when allowing to run at large constitutes negligence.* A cow permitted to run at large in a public highway in the nighttime may be reasonably expected to lie down in the road and become a danger and menace to travel.

4. ROADS AND BRIDGES, § 241*—*when modification of instruction as to contributory negligence of driver of horse proper.* In an action for personal injuries resulting from the plaintiff driving over a cow lying in the highway, a modification of an instruction that the plaintiff could not recover if he "could by the exercise of reasonable and ordinary care have so driven his horse and buggy prior to and at the time in question as to have avoided the accident," by inserting the word "just" before "prior," *held* proper and not to exclude consideration of the question whether the plaintiff was intoxicated, since if he could not have seen the cow because he was intoxicated he would not have been exercising due care.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ellen H. Laughlin, Appellant, v. William G. Dalton, Appellee.

Gen. No. 6,200.

1. FRAUDS, STATUTE OF, § 3*—*when promise to repay money loaned to promisor's wife within statute.* A promise to repay money loaned to the promisor's wife to pay a bill, *held* within the Statute of Frauds and unenforceable in the absence of a new consideration moving to the promisor.

2. ASSUMPSIT, ACTION OF, § 89*—*when evidence insufficient to sustain judgment for plaintiff in action on promise to pay debt of another.* In an action based on the promise of one to pay the debt of another when he should be able, *held* that a judgment for the plaintiff could not have been sustained in the absence of proof that the defendant was able to pay the debt when the action was brought.

3. HUSBAND AND WIFE, § 75*—*when husband not liable for money loaned to wife.* A husband *held* not liable for money loaned to his wife to pay a butcher's bill so as to facilitate the husband's obtaining a loan.

Appeal from the County Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

JOHN W. WELCH and GEORGE E. PHILLIPS, for appellant.

ERNEST S. GAIL, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Appellant, Ellen H. Laughlin, sued the appellee, William G. Dalton, the husband of her deceased sister, in a justice court to recover one hundred dollars which she loaned his wife, her sister, in her lifetime. The case was tried in the County Court on appeal. At the close of the plaintiff's evidence, the court directed a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

verdict for the defendant and entered judgment thereon, from which this appeal is taken.

The court excluded a letter offered by the plaintiff in evidence and error is assigned thereon. We will consider the evidence, including that letter, in determining whether a verdict could reasonably be found for the plaintiff.

Appellant testified that in November, 1912, she sent, or caused to be paid to her sister, one hundred dollars; that her sister died February 8, 1913, and at the time of her death was living with appellee at Lake Forest, Illinois; that she received a letter from her sister November 8, 1912, in which she, the sister, was speaking of a loan that her husband was about to obtain from a bank, and said she was afraid the bank would inquire if the bills were paid, and if they learned they were not they might refuse the loan, and that she had asked "Rosie" to get the money from appellant until everything would be settled down again and then she would pay it back, but that Rosie said she could not get it on appellant's book and gave it to her from her own, and she would pay Rosie as soon as the house was settled. This is the letter that was excluded, and if material at all it is because it tends to show the purpose for which the money was desired. It is not clear how this transaction developed into the one hundred dollar loan in question here, but it does appear that appellant loaned her sister one hundred dollars in November and that the money was used to pay a butcher's bill, and there is an inference in the testimony that the butcher's bill was a family expense that had been incurred before the payment. Appellant testified that she did not loan the money to appellee and never told him of the transaction during the life of her sister, but that immediately after her sister's death appellee spoke to her of bills that he had to pay and she said to him: "'You can't be so much in debt, because I gave you one hundred dollars to straighten out all

those debts,' and he said, 'You did,' and I said, 'Yes, I did,' and he said, 'Well, I will see that you get your money back, Ellen,' and I said, 'I did not ask for the money, but I can't understand how you are so much in debt,' and he said, 'That is all right, you need your money and I will see that you get it.'" She introduced in evidence a letter afterwards written by appellee apparently to her and signed by him after calling appellee to the stand to identify the letter and his testifying that he wrote it but never sent it to her, in which letter is said: "As for the money you claim Delia owed you, it will be impossible for me to pay it for some time. I have drawn notes to settle other accounts which I had to settle or have suit started against me, and still owe the doctors, all three, but it will all have to wait until I can get it, so there is no use of you making a special trip to see me." The foregoing is all the testimony upon which appellant can rely for a recovery.

The one hundred dollar loan was unquestionably made to appellee's wife and not to him. It was therefore the debt of "another" and appellee's promise to pay it was within the Statute of Frauds. We see nothing in the facts to remove it from the operation of that statute. It is said in 20 Cyc. 188:

"A promise to pay the debt of another is within the statute unless it is founded on a new and independent consideration passing between the newly contracting parties and independent of the original contract. In the absence of such a consideration the promise is collateral."

That is a fair statement of the law as held in Illinois. (*Eddy v. Roberts*, 17 Ill. 505; *Resseter v. Waterman*, 151 Ill. 169; *Borchsenius v. Canutson*, 100 Ill. 82, 92.) A collateral promise whether made before or after or contemporaneous with the promise of the primary or original debtor is void unless in writing. (20 Cyc. 163.) The above statement of the law as to the effect of a consideration in taking the case out of the

statute seems to dispose of any query that may arise under the facts in the present case, whether the fact that the one hundred dollars was borrowed and used to pay a debt for which appellant was liable would furnish a consideration to support his oral promise to pay it. There was no "new and independent consideration" to support the promise. If we read the letter signed by appellee as a promise to pay if he became able, it still would not support a judgment, because there is no proof that his condition had changed, or that he was able to pay the debt when the suit was brought.

Appellant cites a number of authorities from other jurisdictions to support the proposition that: "Money loaned to a wife when its application can be traced to the purchase of necessaries, is necessaries for which the husband is liable." There is an interesting field of inquiry presented in that statement; but assume it to be the law without qualification, still we do not see its bearing on the question here. If a husband fails to supply his wife with necessaries she may, while cohabitating with him, or upon his desertion of her, bind him by her contracts with third persons for such purpose. (21 Cyc. 1216.) But there is no proof or inference in the record that appellee failed to provide his wife with necessaries. No proof that the butcher's bill was for articles furnished that would fall within the meaning of the term "necessaries." It may or may not have been for necessary food for the family. Assume that it was, still this action is not for necessary food furnished the wife. It is not even for money required to pay a bill that would enable the wife to procure necessary food. It is for money loaned to pay a debt and keep the husband's credit good enough so he could obtain a loan from a bank for another purpose, probably the purchase of a home.

Appellant argues that section 15 of chapter 68 of our Revised Statutes (J. & A., vol. 3, ¶ 6152) in some

way aids in making appellee liable to pay the debt. We do not see the application. This statute makes the "expenses of the family" chargeable upon the property of both husband and wife and provides that they may be sued therefor jointly or separately. If the debt paid with the one hundred dollars loaned was for a family expense it was one for which appellee and his wife were liable, and appellant would have no greater rights than if it paid a debt for which appellee was liable. It is not argued, and we see no ground for argument, that from the mere fact that a party desires to pay the debt of another and borrows the money from a third party for that purpose and pays the debt, that an action at law can be maintained by the party loaning the money against the original debtor to recover the amount so loaned and used. It still remains the debt of the party borrowing the money and not of the party whose debt was paid. And whatever the law may be as to the liability of a husband for money loaned his wife to purchase necessaries or to purchase articles for family use, we see no right of recovery here, and conclude that the trial court did not err in directing a verdict for the defendant. The judgment is affirmed.

Affirmed.

Mueller Grain Company, Appellee, v. Chicago, Peoria & St. Louis Railroad Company, Appellant.

Gen. No. 6,209.

1. COMMERCE, § 5*—*what is effect of Carmack amendment to Interstate Commerce Act.* Since the passage of the Carmack amendment to the Interstate Commerce Act, State legislation, regulations and policies, concerning interstate commerce, are superseded and controlled by such act.

2. NEGLIGENCE, § 191*—*when question of law.* When there is no doubt about whether or not an act is negligent, such question becomes one of law.

3. NEGLIGENCE, § 51*—*when recovery may be had for damage caused by act of God.* Recovery may be had for damage caused by act of God where, but for the negligence of the defendant, such damage would not have occurred.

4. CARRIERS, § 114*—*when liable for loss of goods by flood due to failure to transport promptly.* In an action for damages to a shipment caused by a flood, a recovery *held* proper where evidence showed that but for a delay in transportation the shipment would not have been so damaged, and there was no evidence that the carrier was not negligent in failing to promptly transport.

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

STEVENS, MILLER & ELLIOTT, for appellant; WILSON, WARREN & CHILD, of counsel.

CLARENCE W. HEYL and HARRY C. HEYL, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

March 7, 1913, Mueller Grain Company, appellee, shipped a carload of oats on the appellant's railroad billed "rush time freight shipment," to Altoona, Pennsylvania, a distance of about seven hundred miles.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The ordinary time required for the arrival of such freight at that destination was about seven days. The car arrived at Dayton, Ohio, March 24, 1913, seventeen days after the shipment, on its way to its final destination. Flood conditions at Dayton were at that time bad and became worse for several days, and it was impossible to remove the car until the water went down, at which time it was found that the oats were wet and damaged. This action was begun before a justice of the peace to recover for that loss and tried on appeal in the Circuit Court, appellee's theory being that appellant was liable for unreasonable delay of the car while en route and for placing the car in Dayton, Ohio, in the railroad yards at a point where the carrier knew the car would be in danger because of the flood; that notwithstanding the actual damage from the flood was the act of God, the defendant because of such negligence was liable. Appellant defended on the theory, as expressed by it in its brief here, that: "A carrier is not liable for a loss of property in shipment through an act of God which could not reasonably have been foreseen, although but for its previous negligence, by which the shipment was delayed, the property would have escaped the danger and the loss would not have occurred." The court adopted appellee's theory of the law in its instructions to the jury, and there was a verdict and judgment for the plaintiff of $160.60, from which judgment the defendant appeals.

Appellant correctly says that: "Since the Carmack amendment to the Interstate Commerce Act, State legislation, regulations and policies are superseded and controlled by the Interstate Commerce Act." *Michelson v. Judson Freight Forwarding Co.*, 268 Ill. 546. Appellant says that decisions of the United States Supreme Court are controlling, and relies on *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 210 U. S. 1, to sustain its proposition of law that a carrier is not liable for loss occasioned by an act of God not-

withstanding its previous negligence exposed the goods to the danger. We regard that case as decisive authority to the contrary. The court was there considering the loss of some cattle occasioned by the flood that engulfed portions of Kansas City in May and June, 1903, and after disposing of a question of practice devoted eight pages of the opinion to a statement of facts to determine whether or not any negligence of the defendant contributed to the injury, and discussed the claim of the plaintiff that the defendant was guilty of negligence in locating the cattle in that field of danger at that time, and concluded that there was an entire absence of all negligence in selecting the route and that there was no evidence of negligence that would justify the submission of the case to a jury. It is very plain that the question whether the defendant's negligence had contributed to the proximate cause of the injury complained of was regarded by the court as controlling, and the fact that the court concluded there was no such negligence, and no evidence of such negligence that required a submission of the question to a jury, certainly furnishes no ground for refusing to consider the question of defendant's negligence in another case. Negligence is always a question of fact, unless like any other question of fact it becomes so certain that there was or was not negligence that there can be no reasonble dispute about it, then, like any other question of fact, it may be treated by the courts as matter of law. There was no negligence of the carrier in the case of Kansas City flood, therefore the loss was by the act of God. If there was no negligence of appellant that contributed to the proximate cause of the injury, the loss in this case by the Dayton flood was by the act of God. Under the title "Act of God," 1 Corpus Juris, page 1172, the authorities are very thoroughly collected and discussed, and it is there said on page 1174: "The principle embodied in all the definitions is that the act must be one

occasioned exclusively by the violence of nature and all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God."

There was no effort in the court below to show that the defendant was not negligent in failing to ship the car to its destination in a reasonable and ordinary time. The delay in shipment was sufficient evidence of negligence of the defendant to require a submission of that question to a jury. But for that delay the oats would not have been damaged, therefore, under the authority of the Federal courts and what seems to be a general rule of law (*Sandy v. Lake Street El. R. Co.*, 235 Ill. 194, 202), we are of the opinion that the court did not err in construing the law, therefore the judgment is affirmed.

Affirmed.

John D. Connors, Appellant, v. Henry Winke, Appellee.

Gen. No. 6,219. (Not to be reported in full.)

Appeal from the County Court of Will county; the Hon. GEORGE J. COWING, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Action by John D. Connors, plaintiff, against Henry Winke, defendant, to recover for injuries to his automobile. From a judgment for defendant, plaintiff appeals.

John D. Connors and Henry Winke were riding on a public street in the City of Joliet, each driving his own automobile. They met at the intersection of another street, and there was a collision in which plaintiff's car was injured.

Each of the parties testified on the trial, and made it quite plain that he was driving his car slowly and with care, and the other party was driving in a reckless manner and entirely responsible for the collision. Each party was corroborated by other witnesses, and there was a conflict of evidence as to what happened, and where and why.

E. MEERS, for appellant.

GARNSEY, WOOD & LENNON, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. NEW TRIAL, § 52*—*when proper because verdict against evidence.* When the weight of evidence is clearly and manifestly

*See Illinois Notes Digest, Vols XI to XV, and Cumulative Quarterly, same topic and section number.

against the verdict, it is the duty of the trial court to grant a new trial, failing in which the judgment will be reversed upon appeal.

2. EVIDENCE, § 315*—*what is purpose of documentary evidence.* Photographs, diagrams and drawings are often proper, not as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony.

3. NEW TRIAL, § 79*—*when motion for on ground of newly-discovered evidence properly denied.* A motion for a new trial on the ground of newly-discovered evidence, *held* properly denied where no reason was given why certain witnesses, whose testimony was relied on, were not produced at the trial.

City of Spring Valley, Appellee, v. Chicago, Ottawa & Peoria Railway Company, Appellant.

Gen. No. 6,031.

1. FRANCHISES, § 6*—*when ordinance grants use of street for interurban railroad.* In a suit to restrain an interurban electric railway from operating its trains over a street, an ordinance *held* to clearly grant a right of way thereon for the use to which it was being put.

2. MUNICIPAL CORPORATIONS, § 83*—*how ordinances construed.* Ordinances must be construed as a whole, liberally, and so as to ascertain and give effect to the legislative intent.

Appeal from the Circuit Court of Bureau county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded with directions. Opinion filed April 14, 1916.

CAIRO A. TRIMBLE, for appellant.

C. N. HOLLERICH, for appellee; J. L. SPAULDING, of counsel.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In this case, appellee, City of Spring Valley, a municipal corporation, filed a bill in equity, in the Circuit Court of Bureau county, against appellant, the Chicago, Ottawa & Peoria Railway Company, alleging that the appellant is wrongfully in possession of and controlling and maintaining a piece of railroad track, one hundred and seventy rods in length, located upon and along a street called Peru street, in the City of Spring Valley, between the eastern limits of the city and a point called Gunther's Curve, together with a number of poles, cross-arms, cables and wires, used in connection with the running of electric motor cars, engines and trains, and in the operation of its electric road along the piece of track in question; and further alleging that the appellant is running a large number of passenger, freight, baggage and express cars and engines, and express, freight and passenger trains, over its line of railway, between the City of Princeton and the Cities of Morris and Ottawa, LaSalle and Peru, to, through and from the City of Spring Valley, and over and along the piece of railroad track in question; and that such use of Peru street, where said piece of track is situated, is without license, authority, franchise, grant or right; and that it is therefore a continuous trespass and a nuisance, and a permanent and a legal obstruction in the street in question; and praying for an injunction to restrain the appellant from running or operating its cars, trains, engines or motors over the piece of railroad track on the street in question, and from using said street for the purpose of operating a railroad thereon; and also praying for a mandatory writ of injunction requiring the appellant to remove from said street every part of said railroad track, cross-arms, poles, cables and wires; and all alleged obstruction of said street making up a part of said track and equipment thereto.

The cause was referred to the master in chancery, who heard the evidence and reported that the appel-

lant had no legal right to use and maintain the tracks and electrical equipment upon the disputed strip, nor to operate its railroad thereon; and the court entered a decree, approving the master's report, and directing that the appellant be restrained from the use of the tracks and equipment on said street, for the purpose of operating a railroad, of any kind, after nine months from the time of the filing of the decree; and that the appellant be required, within the nine months, to remove the tracks and electrical equipment from the street. The appellant prosecutes an appeal from this decree.

It appears from the evidence that the original grant of a right of way to operate electric cars through the City of Spring Valley, and over the strip of track in dispute, on Peru street, was made to the Illinois Valley Traction Company, which was organized as an Illinois corporation under the General Incorporation Act, for the purpose of building and operating a system of street railways and country interurban railways in the counties of Bureau and LaSalle; and this grant of a right of way was made by the City of Spring Valley, upon the petition of the traction company, filed in February, 1902, asking a franchise to build an electric street railway through the city. It was expressly stated in the petition that the traction company had incorporated for the purpose of building, and intended to build, a continuous electric interurban line from Ottawa, and from LaSalle to Ladd, through to Princeton; and that it expected to have its entire line completed some time in the year 1903; and that it was the purpose of the company to commence the construction of its line from LaSalle to Ladd at once.

It is true, as claimed by appellee, that the ordinance, which was passed pursuant to the petition referred to, granted the right of way through the City of Spring Valley, and over the disputed strip on Peru street, for street railway purposes; but it is manifest that

the council, in granting the petition and passing the ordinance, understood perfectly that the street railway purpose for which the traction company intended to utilize the right of way was the running of interurban electric cars through the city, as it was in effect stated in the petition. And the traction company, upon the assumption that it had obtained the right to run its interurban cars through the city, by such grant, built the tracks in question on Peru street and through the city, and used them for such purpose, without objection by the City of Spring Valley, from the time it commenced the operation of its railway in 1903 to about July 1, 1904, when the traction company transferred its rights, property and privileges, as an interurban electric railway, to the Illinois Valley Railway Company.

The record shows that the Illinois Valley Railway Company was incorporated about the time of this transfer, under the Railroad Act of Illinois, for the purpose of operating a commercial and interurban railroad from Joliet through the intervening Cities of Norris, Marseilles, Ottawa, La Salle, Peru and Spring Valley to Ladd and Princeton. By the transfer mentioned, this railway company legally acquired all the lines of railroad in La Salle and Bureau counties, including the piece of railroad track in question, from the Illinois Valley Traction Company, together with all the rights of way and franchises of the traction company in the City of Spring Valley. And the Illinois Traction Company thereupon continued in the operation of the interurban electric railroad through the City of Spring Valley, and over the disputed strip, on Peru street, from the date of the transfer until about April 15, 1908, when the Illinois Valley Railway Company, by proper conveyance, assigned its rights of way, track privileges and franchises to the appellant; and the appellant then continued in the operation of the same interurban electric railway through the

City of Spring Valley up to the present time; and the piece of track in dispute now forms a small link in the continuity of the appellant's line of railway, operating between the Cities of Joliet, Ottawa, LaSalle and Peru, and Princeton and Ladd.

It is claimed by appellee that inasmuch as the grant of right of way through the City of Spring Valley stated in the ordinance was for street car purposes, those purposes cannot be considered as including the use of the right of way by interurban electric cars, even though the city authorities granting the right of way privileges may have actually intended to include them; and even though the city, by repeated acts, through ordinance and by resolutions, may have recognized and sanctioned such use of the right of way in question.

While there may be some force in this contention, we are of opinion that whatever doubt might have existed about the use of this right of way through the City of Spring Valley and over the strip in dispute, for an interurban or commercial railway, such doubt was removed by the ordinance which was passed by the City of Spring Valley on April 24, 1906, in which the Illinois Valley Railway Company was granted the additional franchises and rights of way, and expressly granted the right "to operate railway cars and coaches for the transportation of passengers, baggage, United States mail, express matter and freight," through the City of Spring Valley.

This ordinance grants the right to construct additional railway tracks and equipment, and to operate the railroad along certain streets, which are named, "commencing at a point on the public highway, leading from the City of Peru in LaSalle county, Illinois, to the City of Spring Valley, where the railroad track of the Illinois Valley Railway Company, now constructed and in operation, turns southerly towards what we call Webster Park." Following the special

grant, the ordinance contains the following expression of the purposes for which it was passed, namely: "It is the intention hereof to afford the said Illinois Valley Railway Company a right of way into the City of Spring Valley from the east and through the same to the western boundary lines thereof."

It will be noticed that the ordinance refers to the strip of track in dispute, which was the easterly entrance of the railway company into the city, as the highway where the railroad tracks of the Illinois Valley Railway Company are now constructed and in operation. Thus, in connection with the expressed intention in the ordinance, it takes cognizance of the fact that the Illinois Valley Railway Company was then operating its railway upon the track in question, as a part of its right of way, and using this entrance into the city is so clearly expressed, that there is no room Railway Company a complete right of way through the city is so clearly expressed, that there is no room left for a doubt. The only query that could be raised would be, where it was intended by the ordinance that this right of way should be exercised.

Inasmuch as there was no right of way into or through the city, except over the disputed strip, and as this was the only entrance which the railway company had into the city, and the only connection with the right of way expressly granted in the ordinance, the conclusion is irresistible that the disputed strip was included in the rights of way intended to be granted by the ordinance; especially, when it is considered that the right of way of the railway company into and through the city would not be complete nor usable without this strip.

Ordinances should be so construed as to ascertain the legislative intent, and in construing ordinances they must be looked at as a whole. (*Gage v. City of Chicago,* 196 Ill. 512; *Gage v. Village of Wilmette,* 230 Ill. 428; *McChesney v. City of Chicago,* 173 Ill. 75; *City*

of Chicago v. Wilshire, 243 Ill. 123.) Ordinances, no less than statutes, should be liberally construed in order that their true intent and meaning may be carried out. (*People v. Dill,* 1 Ill. 257; *Harrison v. People,* 195 Ill. 466.)

That the disputed strip was contemplated by the city to be included in the grant of the right of way through the City of Spring Valley in the ordinance of April 24, 1906, is further evidenced by the fact that the city afterwards, on April 6, 1910, adopted an ordinance granting to appellant the right to build, construct and maintain a side track from the disputed strip, which is designated as a part of the main line of its railroad, to St. Bede College land, which side track, proposed by the ordinance, was to be operated by appellant for the purpose of hauling coal, freight and other materials from the main line to St. Bede College.

We are of opinion, that it was the purpose of the ordinance of April 24, 1906, to grant and legalize the right of way of the Illinois Valley Railway Company, to operate an interurban and commercial railway through the City of Spring Valley and over the disputed strip, as a part of such right of way, and that by the terms of the ordinance, the Illinois Valley Railway Company did obtain such right, and that the right thus granted and obtained was legally conveyed and transferred to the appellant; that the appellant, at the time of the filing of the bill of complaint, was in the legal possession of said right, and that, therefore, there is no equity in appellee's bill of complaint, and the same should have been dismissed. And for the reasons stated, the decree should be reversed and the cause remanded with directions to dismiss the bill for want of equity.

Decree reversed and cause remanded with directions.

Jennie Martin, Appellee, v. Fraternal Reserve Life Association, Appellant.

Gen. No. 6,094.

1. INSURANCE, § 868*—*when averment as to suicide of deceased insufficient.* In an action on a mutual benefit policy of insurance, a plea averring that the deceased died by his own hand or act, while sane, is not sufficient as an averment that he committed suicide.

2. INSURANCE, § 868*—*when averment of suicide insufficient as defense.* A plea in an action on a mutual benefit insurance policy, averring that the deceased died by his own hand or act, *held* insufficient to set up the defense provided by a by-law stating that no recovery could be had if the insured "die by his own hand or act," whether sane or insane, inasmuch as the deceased might have died while in a state of transitory mental disorder, such as a trance, epilepsy, hysteria or delirium, which does not constitute insanity.

3. INSANE PERSONS, § 1*—*what does not constitute insanity.* The definition of insanity does not include certain states of transitory mental disorder, such as trances, epilepsy, hysteria and delirium.

4. INSURANCE, § 747*—*when insured bound by change in by-laws.* A beneficiary's right of recovery under a mutual benefit insurance policy, issued subject to changes in by-laws and constitution of the insurer, is governed by such by-laws in force at the time of the deceased's death.

5. INSURANCE, § 744*—*when application part of contract of fraternal insurance.* The application for membership in a fraternal insurance society must be considered part of the contract of insurance.

6. INSURANCE, § 859*—*when by-law limiting time for commencement of suit valid.* A by-law of a fraternal insurance society providing that no suit may be brought in a policy unless begun within six months of the death of the insured, *held* valid and binding.

On Rehearing.

INSURANCE, § 868*—*when plea of suicide sustained.* In an action on a mutual benefit life insurance policy, having indorsed thereon a condition to the effect that if the insured should die "by suicide (except it be shown conclusively that he was and had been insane from disease or injury)," the policy should be null and void, a plea that the insured committed suicide or died by his own hand or act while sane was sustained, inasmuch as such plea was more favorable to the plaintiff than the condition required.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appeal from the Circuit Court of Rock Island county; the Hon. ROBERT W. OLMSTED, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed April 14, 1916. Rehearing denied and additional opinion filed May 24, 1916.

ROBERT H. LOVETT and GEORGE C. WENGER, for appellant.

SEARLE & MARSHALL, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a judgment rendered in the Circuit Court of Rock Island county for $2,281.65, in a suit by the appellee, Jennie Martin, against the appellant, the Fraternal Reserve Life Association, to recover, as beneficiary of a benefit certificate issued to her husband, William B. Martin, by the "Miner of Honor Benefit Order," a fraternal society, whose original name was changed to that of Fraternal Reserve Life Association. Certain defenses to a recovery on the benefit certificate were embodied in special pleas filed by the appellant, to which the court sustained demurrers. These pleas are the amended second, third and fourth special pleas, and the fifth and sixth special pleas, and the seventh, eighth and ninth additional special pleas, which were filed by leave of court.

All the pleas allege that William B. Martin, in his application for membership in the Fraternal Reserve Association in question, expressly agreed to conform in all respects to the constitution, laws, rules and usages of the Order, then in force or which might thereafter be adopted. The second amended plea sets out section 2 of article 12 of the alleged by-laws of the Order, which, it is averred, was in force at the date of the issuance of the certificate of insurance, and re-

mained in full force and effect all the time, and to the date of the filing of the pleas. This section of the by-laws provides that if a member of the Order dies in consequence of a duel, or by the hands of justice, or in consequence of the practice of any pernicious act that tends to shorten life, or by suicide, whether he or she be sane or insane, the certificate of membership in such case shall be null and void; and the plea then further avers that said William B. Martin did die by his own hand or act while sane; and that therefore the certificate of insurance became, by this act of said deceased, null and void.

The amended third plea sets out the same section and article of the by-laws which is set out in the amended second plea, and avers that said William B. Martin did die by his own hand or act; and that having thus died by his own hand or act, said insurance certificate, by virtue of the by-law in question, became null and void.

Special plea No. 5 avers that the order in question, on February 25, 1904, adopted as one of its by-laws, section 51, which is to the effect that the benefit certificate issued to a benefit member by the association, and his written acceptance thereof, his application for membership and the laws of the association, shall be taken together as constituting the contract made by and between each member and the association; and that such contract shall be forever subject to the condition that the same may at any future time be modified by legally enacted amendments to the constitution and by-laws of the association. It also avers that one of the by-laws of the association, in force on and since the 25th day of February, 1904, and to the time of the filing of the plea, is section 53, which provides that if a benefit member of the association die by his own hand or act, whether sane or insane, nothing in the terms or conditions of his benefit certificate shall be held or understood to entitle his beneficiaries to any

part or share in any money fund or property of the association; and then avers that the said William B. Martin did die by his own hand or act, while sane; and that therefore by virtue of the by-law in question, the insurance certificate, or certificate of membership upon which plaintiff's action is founded, became and is wholly null and void.

The sixth special plea sets out substantially the same matters as the fifth special plea, in reference to the by-laws of the association, including the one in reference to self-destruction, and then avers that said William B. Martin did die by his own hand or act; and that therefore, because he died by his own hand and act, the insurance certificate, or certificate of membership on which plaintiff's action is founded, became null and void.

Additional special plea No. 8 alleges practically the same facts as special plea No. 5, and sets out the same sections of the by-laws alleged to have been regularly adopted, and in force at the time of the death of the holder of the certificate, including section 53, in reference to self-destruction; and then avers that said William B. Martin died by his own hand and act while sane; and that, therefore, the insurance certificate, or certificate of membership upon which plaintiff's action is founded, became and is wholly void.

Additional plea No. 9 sets out section 2 of article 12, of the by-laws of the "Miner of Honor Benefit Order," averred to be in force at the time of the issuing of the certificate in question, and at the time of the death of the certificate holder, to the effect that if the miner dies by suicide, whether he or she be sane or insane, the certificate of membership shall become null and void; and then further avers that the said William B. Martin did die by committing suicide, while sane; and that therefore the insurance certificate, or certificate of membership upon which plaintiff's action is founded, became and is void.

Special plea No. 7 sets out certain conditions, alleged to be a part of the contract of insurance and attached to the benefit certificate, which contains the clause that if the holder of the certificate shall die by suicide (except it be shown conclusively that he was and had been insane from disease or injury) that then the certificate shall be null and void in every respect, and of no effect whatever, and all moneys which may have been paid, and all rights and benefits which may have accrued by the certificate, shall be forfeited absolutely and forever, and be of no avail; and then avers that said William B. Martin did die by committing suicide, while sane; and that therefore the insurance certificate, or certificate of membership upon which plaintiff's action is founded, became and was wholly void and of no effect.

Amended special plea No. 4 sets out that part of the application for membership by which the applicant agreed to conform in all respects to the constitution, by-laws, rules and usages of the Order then in force, or which might thereafter be adopted by the order; and sets out a certain by-law averred to have been regularly adopted and in force at the time of the death of the deceased, which is known as section 1 of article 12, and is to the effect that no action shall be maintained, nor recovery had, for any claim arising upon any certificate of membership, after the lapse of six months from the date of the death of a member, unless suit is brought upon such claim within six months from such death; and failure to sue within such time shall be a bar to any recovery upon any such claim; and avers that the plaintiff did not bring this suit until long after the lapse of the six months' period provided for in the by-laws in question; that is to say, six months after the death of said William B. Martin, which occurred on November 3, 1911; and that therefore a recovery on the certificate in question is barred.

We are of opinion that the court properly sustained the demurrer to amended special plea No. 2, and amended special plea No. 3, also to special plea No. 6; but that the other special pleas alleged facts which constitute a legal defense to a recovery upon the certificate in question.

Amended special plea No. 2 is defective in this,—that the averment that Martin died by his own hand or act, while sane, does not necessarily imply that he died by suicide, which is the real basis claimed for avoiding a recovery on the policy under the section of the by-law set forth in the plea. Suicide is the act of taking one's own life voluntarily and intentionally; or the deliberate and intentional destruction of his own life, by a person of sound mind. A person might die by his own hand or act, while sane, and yet the act causing death be unintentional or accidental.

Amended special plea No. 3 is defective for the same reason. The allegation in that plea is merely that he died by his own hand or act, without any averment that such act was intentional or deliberate, or done for the purpose of destroying his life, which would be necessary to bring it within the definition of suicide.

Special plea No. 6 is defective for the same reason. The plea is based upon section 54 of the by-laws, which provides that if a member die by his own hand or act, whether sane or insane, that the beneficiary shall not be entitled to recover; and the averment is merely that William B. Martin did die by his own hand or act, without any allegation that he was sane or insane at the time. If he died by his own act, while in a state of transitory mental disorder, such as a trance, or epilepsy, or hysteria, or delirium, he could not be considered either as sane or insane; and hence his act of self-destruction, while in a delirium or in a trance, could not be considered as within the provisions of the by-law mentioned.

The definition of insanity does not include certain

states of transitory mental disorder, such as trances, epilepsy, hysteria and delirium; and it is usually clear that a person in such a condition of mental disorder could not legally be regarded as sane, because sanity necessarily implies a mental condition which is normal.

The averment in special plea No. 5, however, that said William B. Martin died by his own hand or act, while sane, is directly within the scope of the provision of section 53 of the by-laws of the association against self-destruction, and would operate as an avoidance of the certificate; and the same may be said of the averments in additional plea No. 8 and additional plea No. 9, which are based upon different sections of the by-laws of the Order in question. These pleas, therefore, constituted a proper defense to a recovery upon the certificate. If the by-laws were properly adopted and in force at the time of the decease of the certificate holder, he was bound by them as constituting a part of his contract.

Appellee insists that the application for membership made by the certificate holder is not a part of the contract of insurance. It is the well-settled law of the State, however, concerning fraternal insurance societies, that the application for membership must be considered a part of the contract of insurance; and that where a member agrees, in his application, to abide by and be bound by subsequently adopted by-laws, he is bound by them, unless the by-laws are unreasonable. (*Smith v. Mutual Reserve Fund Life Ass'n,* 140 Ill. App. 409; *Scow v. Royal League,* 223 Ill. 32; *Grand Lodge A. O. U. W. of Illinois v. Oetzel,* 139 Ill. App. 4; *Moerschbaecher v. Royal League,* 188 Ill. 9.)

"In construing the contract by the holder of the certificate, or, rather, that made between the member and the corporation,—the application, the examination by the physician, the constitution and by-laws and the certificate issued are all to be construed together as

the contract between the parties." *Fullenwider v. Royal League,* 180 Ill. 625.

It is practically conceded that the conditions set out in special plea No. 7 are a part of the insurance contract, and the facts alleged in the plea constitute a bar to recovery.

Amended special plea No. 4, which sets out the by-law of the association, averred to be properly adopted and in force at the time of the death of the certificate holder, is a good plea in bar of the action. The limitation fixed by the by-law is that the suit for recovery on the certificate shall be commenced within six months from the death of the certificate holder, and is legal and binding. Similar limitations fixed by contract have been fully sustained by courts of review. *Metropolitan Accident Ass'n v. Clifton,* 63 Ill. App. 153; *Heffron v. Rochester German Ins. Co.,* 119 Ill. App. 571; *Humboldt Ins. Co. v. Johnson,* 1 Ill. App. 312; *Ronan v. Michigan Mutual Life Ins. Co.,* 96 Ill. App. 355; *Merchants' Life Ass'n v. Treat,* 98 Ill. App. 60; *Richter v. Michigan Mut. Life Ins. Co.,* 66 Ill. App. 606; *Stephens v. Phœnix Assurance Co.,* 85 Ill. App. 671; *Riddlesbarger v. Hartford Fire Ins. Co.,* 7 Wall. (U. S.) 390; *French v. Lafayette Ins. Co.,* 5 McLean (U. S.) 463; *Williams v. Vermont Mutual Fire Ins. Co.,* 20 Vt. 230; *Wilson v. Aetna Ins. Co.,* 27 Vt. 101; *Peoria Marine & Fire Ins. Co. v. Whitehill,* 25 Ill. 388; *Smith v. Herd,* 110 Ky. 56; *Kiisell v. Mutual Reserve Life Ins. Co.,* 131 Iowa 54.

For the reasons stated, the demurrers to special pleas numbers 4, 5 and 7 and to additional pleas numbers 8 and 9 should have been overruled. The judgment, therefore, should be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

UPON PETITION FOR REHEARING THE FOLLOWING ADDITIONAL OPINION WAS FILED.

PER CURIAM. In her petition for rehearing appellee calls attention to the condition on the back of the certificate sued on and referred to in the policy, to the effect that if the member shall die "by suicide (except it be shown conclusively that he was and had been insane from disease or injury)," the certificate shall be null and void, and urges that this permits a recovery if the member died by suicide while insane, and that the alleged by-law conflicts therewith, and that the certificate should prevail over the by-law. An examination of each plea approved in the foregoing opinion will show that it alleges that Martin committed suicide, or died by his own hand and act, *while sane*, except one plea which does not relate to that subject but sets up a limitation in bar. The pleas which we sustain are therefore more favorable to appellee than the condition on the back of the certificate. By the condition the proof must show conclusively that the member who took his own life was insane from disease or injury to permit a recovery, while under the pleas if the evidence is evenly balanced as to whether the member who took his own life was then sane, the beneficiary would recover.

Rehearing denied.

Charles E. Smith, Appellant, v. Frank C. Bellrose, Appellee.

Gen. No. 6,123.

1. PLEADING, § 462*—*when failure to join issues in writing waived.* Failure to join issues in writing is waived by voluntarily proceeding to trial.

2. SET-OFF AND RECOUPMENT, § 2*—*what is nature of plea of set-off.* A plea of set-off does not deny the cause of action as alleged but admits it and seeks to avoid it because of new matter set up.

3. PLEADING, § 117*—*when matter in declaration not denied deemed admitted.* When a matter material to the issues is alleged in the declaration and is not denied by a plea, it is admitted and will be presumed to be a fact.

4. LANDLORD AND TENANT, § 321*—*when evidence as to lack of title in landlord inadmissible.* In an action for rent, the tenant cannot introduce evidence to show that his landlord has no title to the demised premises.

5. LANDLORD AND TENANT, § 311*—*what damages may be set off in action for rent.* In an action for rent, damages to the tenant resulting from an unlawful eviction by the landlord may be set off.

6. LANDLORD AND TENANT, § 262*—*what does not constitute an eviction.* A statement by a landlord's agent to a tenant that he must vacate the premises if he does not pay the rent agreed is not an eviction.

7. LANDLORD AND TENANT, § 262*—*what constitutes an eviction.* While it is not necessary that there should be an actual, physical expulsion from the premises occupied by a tenant to constitute an eviction, yet it is necessary that the landlord do some act which disturbs the tenant's possession, or which amounts to a clear indication of an intention on the part of the landlord to deprive the tenant of the enjoyment of the premises as demised to him.

8. INSTRUCTIONS, § 118*—*when improper as not in conformity with evidence.* An instruction which failed to charge the jury that they should confine themselves to the evidence in forming their belief as to matters in issue, *held* erroneous.

9. INSTRUCTIONS, § 115*—*when giving instruction as to allegations unsupported by evidence is improper.* The giving of an instruction concerning allegations of which there is no evidence to support is erroneous.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

10. INSTRUCTIONS, § 63*—*when improper as assuming facts.* An instruction assuming facts disproved by the evidence is erroneous.

11. LANDLORD AND TENANT, § 325a*—*when instruction on right of tenant to remove sand erroneous.* In an action to recover royalties on sand removed by the defendant from the plaintiff's premises, through which a railroad's right of way ran, where though the lease did not actually describe such right of way, it clearly appeared that it was a part of the demised premises, an instruction that the plaintiff could not recover for sand removed from such right of way unless it was described in the lease, *held* erroneous.

12. LANDLORD AND TENANT—*when tenant liable for removal of sand.* The owner of land may recover of a tenant for sand mined by him, in accordance with a lease, on a railroad's right of way running over such land.

13. LANDLORD AND TENANT, § 318*—*when evidence inadmissible under plea of set-off.* In an action by a landowner for royalties for sand removed by a tenant, under a plea of set-off averring an unlawful eviction, and damages consisting of money expended in stripping off the surface material preparatory to the removal of the sand, evidence of what would be a fair charge for such stripping, *held* inadmissible.

Appeal from the Circuit Court of La Salle county; the Hon. S. C. STOUGH, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed April 14, 1916. Rehearing denied May 24, 1916.

L. W. BREWER and BUTTERS & CLARK, for appellant.

H. M. KELLY and BROWNE & WILEY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an action of assumpsit brought by the appellant, Charles E. Smith, in the Circuit Court of La Salle county, against the appellee, Frank C. Bellrose, for the recovery of money claimed to be due as rent for certain premises demised to appellee. There was a trial by jury which resulted in a verdict for appellant, as-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

sessing his damages at $1. Appellant thereupon made a motion for a new trial and in arrest of judgment, which motions were overruled by the court, and judgment rendered on the verdict, from which judgment the appellant has taken this appeal.

The appellant alleges in the first count of his declaration that he leased to appellee a tract of land, which is therein described, lying north of the Illinois & Michigan Canal, and a part of the east half of the north half of the southwest quarter of section 18, in township 33, La Salle county, for a term commencing February 1, 1904, to July 30, 1908, such leasing being in accordance with the terms and conditions of a certain lease theretofore executed between the appellant and one Harry W. Bellrose, and the last mentioned lease is set out in the count *in hæc verba,* and grants to the lessee the right to mine, remove and dispose of sand, and sand rock, situated on the premises, and provides for the payment by the lessee, as rent, a royalty of five cents per ton for each ton of sand, or sand rock, mined and removed from the premises; that the appellee in person and by his agents and employees entered into the possession of the demised premises, in accordance with and by virtue of the terms and provisions of said lease, and thereunder mined and removed from said premises during the term of said lease large quantities of sand, towit: 40,000 tons; that the appellant has in all things performed and kept the terms and provisions of said lease on his part, but that appellee failed to comply with the terms thereof, and failed to pay the royalty provided as rent in the lease for the sand taken and mined, and removed by him from said premises, namely, at the rate of five cents per ton, although requested so to do, to the damage of the plaintiff in the sum of $2,000.

The declaration also contains a second, third, fourth, fifth and sixth count; it also contains a seventh count which is the consolidated common counts. To this

declaration the appellee filed five pleas, namely: a plea of nonassumpsit; a plea of the Statute of Limitations; a plea of the Statute of Frauds, alleging that the agreement as set out in the declaration was not to be performed within a year; and another plea of the Statute of Frauds alleging that the contract was for the sale of an interest in lands, which was for a longer term than a year; also a plea of set-off or counterclaim, alleging that the appellant owes the appellee the sum of $2,000 for goods, chattels and effects before then sold and delivered by the appellee to the appellant; and a like sum for work and services before that time done and bestowed, and materials for the same work furnished by the appellee to the appellant, at his request; and in a like sum for moneys before that time paid and expended by the appellee for the use of the appellant at his request; and in a like sum for moneys found to be due from the appellant to the appellee on an account stated, which said sums of money so due from the appellant to the appellee exceeded the damages sustained by the appellant, by reason of the nonperformance by the appellee of the several supposed promises in the declaration mentioned, and out of which said sums of money the appellee is ready and willing and hereby offers to set off and allow to the appellant the full amount of said damages.

The appellant joined issue on the plea of nonassumpsit, which formed the general issue in the case, and demurred to the second, third and fourth special pleas, and filed a replication to the plea of set-off. Then appellee, by leave of court, withdrew the general issue so far as it pertained to the first count, and the court sustained a demurrer to the second, third and fourth special pleas. Appellee afterwards obtained leave to file two additional special pleas of the Statute of Frauds and the Statute of Limitations, and appellant obtained leave to file several replications to the special pleas on file. But the parties proceeded to trial

without issue having been joined on the special pleas and replications thereto.

Various questions are raised on appeal as to the competency and relevancy of the evidence adduced on the trial, and as to the propriety of giving certain instructions to the jury, and as to the extent of the liability of the appellee under the pleading and evidence.

The failure to join issue upon the special pleas and replications filed is not of importance, inasmuch as the parties voluntarily proceeded to trial without formal written issues joined in that regard. (*French v. Scobey,* 108 Ill. App. 606; *Chicago & A. Ry. Co. v. Jennings,* 114 Ill. App. 622; *Piot v. Davis,* 241 Ill. 434.)

The withdrawal of the general issue, so far as the same pertained to the first count, left as the only defense to that count the matters set up in the plea of set-off, and this plea does not deny the appellant's cause of action, as alleged in the first count, for rent due from appellee as tenant, but admits an indebtedness from the appellee to the appellant on that account, and because of the matters set up in the plea seeks to avoid it. (*Raymond v. Kerker,* 81 Ill. 381.)

When a matter material to the issues is alleged in the declaration and is not denied by a plea, such matter is admitted and it will be presumed to be a fact. (*Morrill v. Baggott,* 57 Ill. App. 530, affirmed in 157 Ill. 240; *Dickinson v. Garland,* 49 Ill. App. 578; *McNeal v. Calkins,* 50 Ill. App. 17; *Williams v. Boyden,* 33 Ill. App. 477; *Lindsay v. Stout,* 59 Ill. 491; *Orr, Saddler & Co. v. Gilbert,* 68 Ill. App. 429; *Culver v. Uthe,* 7 Ill. App. 468.)

Aside from the presumptions which arise from the pleadings, it is clearly established by the evidence that the appellant's claim, as well as the appellee's counterclaim, respectively, grew out of their relation of landlord and tenant. The proof shows that appellant claimed to own the tract of land—about 10.50 acres, described in the first count of the declaration. It

formed a rectangular strip, about 748 feet in length, lying north of the Illinois and Michigan Canal,—and that the right of way of the Chicago, Rock Island and Pacific Railway Company ran lengthwise through this tract of ground. Upon this claimed tract, on the north side of the tracks of the railway company and extending partly on the right of way of said railway, there were large bodies of sand rock and sand, which were valuable for commercial and manufacturing purposes.

It was this tract of land, including the right of way of the railway through the same, that appellee obtained the possession of under the terms of the lease in question, as tenant of appellant. The appellee commenced operations for the removal of the sand about February 11, 1904, paying for the same in monthly payments, and continued in this manner until September, 1906, a period of about two years and a half. A part of the sand which was mined during this period was taken from what constituted the right of way of the railway company, and a part from the land north of the right of way.

It is apparent that about September, 1906, the appellee reached the conclusion that appellant did not have the legal title to the sand and sand rock, which was situated on that part of the tract designated as the right of way of the railway company, and thereupon made a new arrangement with the railway company for mining and removing sand from this part of the premises. After making this new arrangement with the railway company, he denied appellant's title to the part mentioned and refused to pay him any more rent for the same.

The evidence and pleadings clearly establish that appellant was appellee's landlord; that the railroad right of way was on a part of the premises of which the appellee had become possessed as tenant of appellant, and that for over two years he mined sand from the same, as tenant of appellant, and paid rent for

the sand taken in the same manner as for sand mined from other parts of the premises leased; that his subsequent refusal to make further payment was based upon a denial of the title of his landlord to this part of the premises leased, and that after his refusal to pay rent he nevertheless continued, without interruption, to occupy this part and to mine sand thereon, under what he claimed was a superior title in the Chicago, Rock Island & Pacific Railway Company.

That a tenant cannot dispute the title of his landlord to the premises which he has obtained the possession of as tenant while he remains in possession thereof, is a principle of law that is so well settled as to be axiomatic. (*Gable v. Wetherholt,* 116 Ill. 313; *Fortier v. Ballance,* 10 Ill. (5 Gilm.) 41; *Mackin v. Haven,* 187 Ill. 480; *Doty v. Burdick,* 83 Ill. 473; *Cox v. Cunningham,* 77 Ill. 545; *Hardin v. Forsythe,* 99 Ill. 312; *Haynes v. Sherwin-Williams Co.,* 126 Ill. App. 414; *Knefel v. Daly,* 91 Ill. App. 320.) And for the reasons stated, all the evidence introduced by appellee on the trial for the purpose of showing that appellant had no title to the strip of ground in dispute was incompetent.

Appellee insists that he was ordered off of a part of the premises in question by the appellant, through appellant's agent, William A. Smith, that is to say, that he was evicted therefrom. And that in consequence of this ordering off or eviction he was damaged to the extent of about $1,800, this being the amount which would be considered a reasonable and fair charge for the expense of stripping a section of sand rock, which he had caused to be stripped preparatory to mining and removing the sand; and that on account of his eviction he lost the benefit of this stripping and the work done and money expenses therefor. If the appellee was, in fact, evicted, and on that account suffered damages, there is no doubt about his legal right to recoup such damages as a set-off against the rent

due to appellant. But the record does not disclose any eviction, and the only ordering off which appears to have been done was done by appellee himself when he called off his employees from their work of stripping on the part of the premises mentioned, and directed that his "stuff—tools and things—" be taken to the right of way, which was another part of the same premises.

Appellee claimed that this was done by him in consequence of what he states William A. Smith said to him, as agent of his brother, the appellant; but what William A. Smith told him, according to appellee's own testimony, was this: "Well, Frank, Charlie told me to tell you not to take any more sand off from his place there, if you ain't going to pay for it." This language cannot reasonably be construed into an ordering off, or an eviction. It was, in effect, the same as if a landlord had said to his tenant: "I don't want you to occupy these premises if you are not going to pay the rent which you agreed to pay in your lease." And the inference from the language used is inevitable that if he was willing to pay the rent, which was appellee's legal obligation, appellant was willing that he should take the sand. Appellee's refusal to take the sand he had stripped was, in effect, an admission that he was unwilling to pay for it; in which case he would have no legal right to take it under the terms of his lease.

While it is not necessary that there should be an actual, physical expulsion from the premises occupied by the tenant to constitute an eviction, yet it is necessary that the landlord do some act which disturbs the tenant's possession, or which amounts to a clear indication of an intention on the part of the landlord to deprive the tenant of the enjoyment of the premises as demised to him to constitute an eviction. (*Keating v. Springer*, 146 Ill. 481; *Hayner v. Smith*, 63 Ill. 430.)

Some of the instructions given contain statements

which were prejudicial to appellant's right to recover. Instruction No. 22, given for appellee, contains this language: "Yet if you further believe that plaintiff, by himself, or his agent, William A. Smith, determined and declared at an end the rights of defendant to continue to mine such sand as a tenant, and ordered him from the premises, and if you further believe that pursuant to such order defendant left the premises of plaintiff and thereafter mined sand from the right of way of the Chicago, Rock Island & Pacific Railroad Company, and that such right of way was not described in said lease, then and in that instance plaintiff would be without right to charge defendant for such sand as was mined and shipped by him from the right of way of the Chicago, Rock Island and Pacific Railroad Company."

Under the terms of this instruction it was not necessary for the jury to form their belief concerning the matters stated in the part of the instruction above quoted, from the evidence, as the law requires, and it allowed the jury, regardless of any evidence, to form a belief that appellee left appellant's premises pursuant to an order by the appellant, when as a matter of fact there is no evidence whatever in the record to show that appellee was ordered off of the premises leased to him. The instruction also assumes that appellee left appellant's premises, when the proof shows that he did not leave the premises leased to him, which in this case must be regarded as appellant's premises, but on the contrary the proof is to the effect that he remained in possession of them after the alleged ordering off, and mined sand from the same. This instruction also bases appellant's right to recover upon the condition that the railroad right of way was described in the lease. Inasmuch as the right of way was not actually described in the lease, although clearly a part of the demised premises, this part of the instruction practically directs a verdict against appel-

lant's right to recover rent for the sand mined on the railroad right of way, for which appellant claimed the right to recover rent as a part of the premises leased to appellee. It is evident, therefore, that the instruction is defective and misleading.

Instruction No. 23 is as follows: "The court instructs the jury, as a matter of law, that if you believe that the sand mined by defendant and for which plaintiff claims an amount to be due and owing from defendant, was in fact mined from the right of way of the Chicago, Rock Island & Pacific Railroad Company, and not from any premises described in the written lease offered in evidence, then, and in that instance, plaintiff cannot recover for such sand so mined from the right of way of the Chicago, Rock Island & Pacific Railroad Company." It will be noticed that this instruction tells the jury, in effect, that the right of way of the Chicago, Rock Island & Pacific Railway Company is not a part of the premises described in the lease and that therefore appellant could not recover for sand mined on such right of way, and directs a verdict on that question. This is clearly in contravention of appellant's legal right to recover for sand mined on that part of the right of way which was occupied by appellee as tenant of appellant.

Some of the objectionable features mentioned appear also in instruction No. 28, and in other instructions which were given for appellee. Instruction No. 26 had reference to appellee's claim of set-off. The evidence concerning what would be a fair charge for stripping was not admissible under the averments of the plea; nor was it competent matter to be considered by the jury, in recoupment against appellant's claim for rent, inasmuch as the recoupment was based on a claim of eviction, and the evidence does not show any eviction. The instruction was therefore erroneous.

For the reasons stated, the judgment should be reversed and the cause remanded for another trial.

Reversed and remanded.

Henry Forbes, Appellee, v. Celeste A. Davis, Appellant.

Gen. No. 6,159. (Not to be reported in full.)

Appeal from the Circuit Court of Livingston county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 14, 1916.

Statement of the Case.

Action by Henry Forbes, plaintiff, against Celeste A. Davis, defendant, to recover real estate commissions. From a judgment for plaintiff, defendant appeals.

There was a sharp conflict in the evidence as to the terms of the contract upon which the claim for commission was based. Plaintiff claimed that defendant agreed to pay him a commission of $1 per acre for finding her a purchaser, and that she fixed the price of the farm to be sold at $130 per acre, while defendant claimed that she agreed to pay the commission named, only upon condition that the purchaser whom plaintiff should find for her would pay the price of $130 per acre, and that plaintiff was not to have a commission unless $130 per acre was paid by such purchaser for the farm.

The evidence tended to show that the purchaser of the farm, to whom defendant finally sold it for $125 per acre, was procured through the instrumentality of plaintiff, that is to say, it was plaintiff who induced this purchaser to visit defendant and the farm with a view of buying it. One of defendant's defenses, however, was that before she sold the farm to this party who finally did purchase it, plaintiff deceived her into believing that this purchaser was not one which plaintiff had procured for her, but that he had brought with him the person whom he expected to bring about the

sale of the farm for her, and wanted her to make a contract with him in reference to the matter.

The plaintiff denied that he made any statements to defendant to that effect, or that he told her that this purchaser "was not his man."

ARTHUR H. SHAY, for appellant.

F. A. ORTMAN and LYLE M. SHELLY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 61*—*what is effect of deceit on right to recover commissions.* Under a contract whereby a landowner agrees to pay an agent a certain sum per acre if he produces a purchaser and fixes the price per acre at which she will sell, the agent cannot recover his commission, though he introduced a person who finally became a purchaser at a price lower than that fixed by the owner, if, at the time, he deceived the owner by telling her that such person was not a prospective purchaser but one through whom he expected to bring about a sale, and thus induced her to sell for an amount less than she would have otherwise exacted.

2. INSTRUCTIONS, § 114*—*when ignoring defense improper.* An instruction which purports to state all the facts necessary to a recovery, and ignores a matter of defense of which there is proof, is erroneous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

L. L. Eaves for use of R. O. Ahlenius, Appellant, v. Chicago, Burlington & Quincy Railroad Company et al., Appellees.

Gen. No. 6,166.

1. ASSIGNMENTS, § 11*—*when approval by debtor not necessary.* A rule of the relief department of a railroad that an assignment of a claim of a member of such department cannot be legally made without the approval of the department superintendent is not a bar to an action based on an assignment.

2. ASSIGNMENTS, § 11*—*when acceptance of assignment of part of claim necessary.* An assignment of a part of a claim or demand is not legally binding upon the payor, unless such assignment is accepted by him.

3. ASSIGNMENTS, § 25*—*what are rights of assignee.* While under section 18 of the Practice Act (J. & A. ¶ 8555), the assignee of a claim or demand may sue in his own name to recover the amount due, his rights are otherwise no greater, thereunder, than they were at common law.

4. ASSIGNMENTS, § 11*—*when acceptance by debtor necessary.* A member of the relief department of a railroad *held* not entitled to recover for the use of the assignee on an assignment, of part of his claim for injuries, which had not been accepted by the superintendent of the department.

Appeal from the Circuit Court of Knox county; the Hon. R. J. GRIER, Judge, presiding. Heard in this court at the October term 1915. Affirmed. Opinion filed April 14, 1916.

R. D. ROBINSON, for appellant.

WILLIAMS, LAWRENCE, WELSH & GREEN, for appellees; J. A. CONNELL, of counsel.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

It appears from the stipulation of facts, and the evidence introduced at the trial of this case, that L. L.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Eaves was an employee of the Chicago, Burlington & Quincy Railroad Company, and a member of the relief department of that company, which was organized and conducted for the purpose of establishing and managing a fund to pay certain sums to employees of the railroad company, who are members, in case of disability; payment to be made in accordance with the rules and regulations of the relief department; also to pay certain amounts, in the event of the death of members, to relatives, or to other beneficiaries designated by them, with the approval of the superintendent of the department.

The railroad company mentioned has charge and control of the relief department, and of the money which constitutes the fund from which payments are to be made. One of the rules and regulations of the relief department is that benefits payable on account of the disability of a member shall be payable only to such member, or in accordance with his written order, when approved by the superintendent or his legal representative.

Eaves was injured and disabled while in the service of the railroad company, and was therefore, as a member of the relief department, entitled to receive relief from the benefit fund referred to, first at the rate of $2 per day, from March 30 to March 31, 1909; and thereafter from June 1, 1909, to January 26, 1910, at the rate of $1 per day. On June 17, 1909, Eaves gave to the appellant R. O. Ahlenius, to whom he was indebted, an order on the relief department, which was as follows:

"June 17, 1909.

"To the Burlington Relief Association:

"Out of any money now due or hereafter becoming due me from you as relief, sick benefit, or otherwise under my contract with you, please pay to the order of R. O. Ahlenius the sum of $125.00 and charge the same to my account.

L. L. Eaves."

This order was mailed to the superintendent of the relief department on the same day that it was given, and received by the superintendent, who at once refused to honor the order or to approve it, and notified the appellant to that effect on the next day. It is contended by appellant that the order operates as an assignment of that part of Eaves' claim or demand against the relief department which was embraced in the order, namely, of $125 of the amount of sick benefits then due or thereafter to become due and payable to Eaves.

Appellee claims that under the rules of the relief department an assignment of the claim of a member of the relief department cannot legally be made without the approval of the department superintendent. We are of opinion that the rule in question is no legal bar to an assignment, but an assignment to become legally effective, without acceptance, must be for the whole of the claim of demand. (*Savage v. Gregg*, 150 Ill. 161.) The order in this case was for a portion only of the Eaves claim. It has been repeatedly held by our Supreme Court that the assignment of a part of a claim or demand is not legally binding upon the payor, unless such assignment is accepted by him.

In the case of *Chapman v. Shattuck*, where an attorney claimed an assignment of a part of his client's claim on an appeal bond for his fees, the Supreme Court clearly determines the point under discussion, and uses this language: "It is insisted that Burgess had such an interest in the subject matter of the suit as to preclude the parties from compromising it without providing for the payment of the amount due him. If this position can be sustained, it must be on the ground that he was the equitable assignee of the chose in action, on which the suit was instituted. The doctrine is now well settled, that courts of law will recognize and protect the rights of the assignee of a chose

in action, whether the assignment be good at law, or in equity only. * * * A partial assignment, however, of a chose in action will not suffice to bring the case within the principle. The whole cause of action must be assigned. It was well remarked by Justice Story, in *Mandeville v. Welch,* 5 Wheaton, 277, that 'a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into payments.'" (*Chapman v. Shattuck,* 8 Ill. [3 Gilm.] 49.)

And in the case of *Crosby v. Loop,* where a landlord had conveyed a part of the premises held by a tenant, and had given an order to the grantee, on the tenant, to pay to such grantee a portion of the rent, and the tenant declined to honor the order, and refused to accept or pay the same, the Supreme Court says: "The drawing of the order in connection with the grant of the reversion did not amount to an assignment of two-thirds of the rent to the plaintiffs. The order was the single direction of a creditor to his debtor to pay a third person a certain sum out of a particular fund. The legal interest to any portion of the fund did not pass to the plaintiffs. If the order had included the whole of the rent reserved by the lease, it might have amounted to an equitable assignment of the fund, to recover which the plaintiffs could have sued in the name of the defendant; and perhaps they would have been compelled to use all reasonable diligence to obtain payment from the tenants, before they could have recourse against the defendant. But the present is a very different case. The whole of the debt was not embraced by the order, and Robinson & Co. were not bound to discharge it in fractions to different persons. The plaintiffs could not have maintained an action

against them in the name of the defendant. The principle that an entire contract cannot be apportioned, and performance enforced in fragments, would have presented an unsuperable bar to a recovery." (*Crosby v. Loop*, 13 Ill. 625.)

Under section 18 of the Practice Act (J. & A. ¶ 8555), the assignee of a claim or demand of this character may sue in his own name to recover the amount due, but the assignees' rights are otherwise no greater than or more extended under this statute than they were at common law. (*Ensign v. Illinois Cent. Ry. Co.*, 180 Ill. App. 382.)

We are of opinion, therefore, that inasmuch as the order in question did not include the whole of the Eaves claim or demand against the relief department of the Chicago, Burlington and Quincy Railroad Company, it was not legally binding upon the company, as an assignment, without the acceptance or approval of the department, and that the trial court did not err in finding for the defendant. The judgment should be affirmed.

Affirmed.

Commercial State Bank of Forreston, Appellee, v. Eilert Folkerts, Appellant.

Gen. No. 6,170.

1. BILLS AND NOTES, § 411*—*when burden on defendant to show fraud.* Where duress or fraud are set up as a defense to an action on a promissory note the burden is on the defendant to prove such averments by a preponderance of the evidence.

2. BILLS AND NOTES, § 441*—*when evidence insufficient to show fraud in procuring execution of.* In an action on a promissory note, the preponderance of the evidence *held* to negative fraud and duress in procuring the signing thereof.

3. BILLS AND NOTES, § 50*—*when supported by consideration.* Where a promissory note, given in discharge of an obligation of another than the defendant, was signed by the defendant on a day subsequent to that on which it was signed by such other party, but it was not intended by the payee to be, and was not in fact, accepted until it was signed by the defendant, *held* that no new consideration moving to the defendant was necessary to make him liable thereon, inasmuch as the signing by both parties and the acceptance were a part of the same transaction.

4. BILLS AND NOTES, § 50*—*when consideration sufficient to bind signer.* The discharge of an existing indebtedness of another is a sufficient consideration to bind one signing a note, given in discharge thereof, whether he signs as joint principal, maker or surety.

5. TRIAL, § 292*—*when propositions of law assuming facts properly refused.* It is not error to refuse to hold propositions of law assuming facts which do not agree with actual facts as shown by the evidence.

6. APPEAL AND ERROR, § 1567*—*when incorrect rulings on propositions of law harmless error.* Conclusions of law based on an assumed state of facts are abstract propositions, and incorrect rulings in abstract propositions of law are harmless error where the judgment is in accordance with the law and evidence governing the case.

7. APPEAL AND ERROR, § 1567*—*when refusal to hold correct propositions of law harmless error.* Refusal to hold propositions of law on matters not in issue, even though they are correct, is not reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appeal from the Circuit Court of Ogle county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

WILLIAM J. EMERSON and JAMES M. HUFF, for appellant.

J. C. SEYSTER, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

This is an appeal from a judgment rendered against appellant, by the Circuit Court of Ogle county, for the sum of $1,477.59 upon a promissory note after a trial by the court without a jury. A judgment upon this note had been originally entered by confession under power of attorney attached to the note, bút upon petition by the appellant the judgment was opened and he was allowed to plead and make his defense to a recovery upon the note. The defenses upon which appellant relied, and concerning which evidence was offered, were want of consideration, duress, and fraud and misrepresentation.

The proof shows that appellant's son, Frank Folkerts, had been engaged in the business of buying and selling live stock, and became indebted to appellee, the Commercial State Bank of Forreston, on a note for $1,000; also for an overdraft amounting to the sum of $297.42, and that the note in question was taken by appellee in liquidation and settlement of the $1,000 note and the overdraft. The evidence is very conflicting, especially as to what occurred between the parties at the time the note was taken by appellee.

The appellant claims that George Snyder, appellee's cashier, came to him at his home in Forreston and told him that his son Frank had overdrawn his account and that he wanted appellant to make it right at the bank, but that appellant refused to do so; that the next day

the cashier came again to see him about the matter of the overdraft and again insisted that appellant would have to do something about it, but that he again refused; whereupon the cashier told him that he would go to Oregon and have his son Frank arrested for making the overdraft; that the matter of the arrest of his son worried appellant during the night following and induced him to go to the bank the next morning and sign the note; that he signed the note without reading it, upon the representation of the cashier that it was merely for the $297.42 overdraft, but discovered as the cashier picked up the note that it was for a larger amount and then wanted to know why it was and also at once demanded the note back, but that the demand was refused.

On the other hand, the cashier testifies that he never made any threats to have appellant's son arrested, and never asked appellant to make good his son's overdraft; that the only conversation prior to the execution of the note by appellant, which he had with appellant, occurred one day at the bank several weeks prior to the signing of the note; that at that time he called appellant into the bank and asked him when Frank was coming back, and then appellant wanted to know why he asked about Frank, and he then told appellant that there was an overdraft there and he would like to have it cleaned up; that this was all there was said to appellant about the overdraft at that time and prior to the signing of the note, and that it was on the occasion mentioned that he gave appellant a slip of paper showing the amount of the overdraft.

Several weeks after this conversation appellant's son Frank came into the bank and the matter of the overdraft was discussed with him, and he was then told that he would have to give the bank a new note, with sureties, to cover not only the amount of the overdraft but also the amount due on the $1,000 note, the surety to be given to be satisfactory to the bank; that

the note in question was thereupon prepared and then signed by Frank Folkerts and that he promised to send some one, who would be satisfactory to the bank, to sign as surety, and mentioned the name of Henry Drake, and was told that Drake would be satisfactory; that Drake, however, did not come in to sign and that the next day he, the cashier, went to see Frank about the surety at his father's house and saw Frank there; that he was hauling gravel at the time; that he inquired of him about the surety and Frank told him he would let him know after supper about the matter; that afterwards the witness went into the country and after he came back, that evening, Frank Folkerts met him at the bank corner and informed him that the appellant, his father, would sign the note the next morning, and that the next morning the appellant did come into the bank and stated that he wanted to sign the note with Frank; that the note was handed to appellant and he asked how much it was and was told by the witness that it was for $1,322.42; that upon learning the amount he asked what Frank did with all that money; whereupon the witness informed him that he did not know, but that Frank had bought an automobile, but that he didn't know what he had done with the rest of it; that appellant then signed the note and walked out.

The cashier also testified that appellant, before signing the note, put on his glasses and looked it over; that he did not make any objection to it after he had signed it nor demand it back at that time. But that some days after the date of signing, appellant came into the bank and said he wanted his name taken off the note, and when asked why, he replied that Frank had been drinking and was acting like a crazy man and that he would not be security for him, and that thereupon the cashier told him that his name would come off of the note when he paid the note, and not before.

The cashier also testified that the appellant never

claimed in any conversation with him that the note was for a larger amount than he thought it was when he signed it; that the first he knew of any such claim on the part of appellant was in January, just before the judgment was entered on the note.

The testimony of the cashier as to what took place at the time of the signing of the note is corroborated by Martin H. Eakle, the vice president of the bank; and Dr. Overfield, the president of the bank, testified that appellant came to see him a few days after he had signed the note and asked him to see that his name was taken off of the note, and when he inquired why, the appellant said: "Because Frank had been drinking too much, and he didn't care to have his name on the note with Frank any longer"; that appellant gave no other reason for wanting his name off and didn't claim, at that time, that the note was for a larger amount than he thought it was when he signed it.

It was incumbent on appellant to establish his defense by a preponderance of the evidence, but the record discloses a preponderance of the evidence against appellant's contention that the note was signed by him under the influence of threats to arrest his son Frank, and his signature was obtained by fraud or false representations. It is insisted by appellant that he received no consideration for signing the note. It is not necessary that appellant should have received a separate and distinct consideration for the obligation which he assumed by signing, merely because his signature was attached to the note on a different day from the date of signing by his son Frank, if the signing was originally intended and merely delayed. (*Ives v. McHard,* 2 Ill. App. 176, affirmed in 103 Ill. 97.)

If the signing of the note had been a separate transaction; if the note, before appellant's signature was attached, had already been accepted by appellee, and after such acceptance appellant had been called upon

to sign, and signed, then such signing would be a separate act distinct from the original transaction; and in that case it would have created a separate and distinct obligation and contract and would also have required a separate consideration to support it; but the evidence clearly tends to show that appellant's signing, though separated in point of time from the signing by his son, was intended to be and was a part of the same transaction by which the note in controversy was made, taken and accepted as a payment and discharge of a pre-existing indebtedness of appellant's son, and that the transaction was not completed until appellant had signed the note, and that the note was not acceptable to appellee, nor accepted, until the signature of appellant had been attached to it.

Under these circumstances it was not necessary that there should have been a separate consideration to support appellant's obligation. The consideration received by appellant's son, as maker of the note, is sufficient to legally bind appellant to the obligation assumed by him in signing it. (*Harty v. Smith*, 74 Ill. App. 194; *McMicken v. Safford*, 197 Ill. 540; *Wylie v. Dickenson*, 50 Ill. App. 622.)

The fact is not controverted that the note in question was accepted by appellee, in satisfaction and payment of pre-existing claims which appellee held against appellant's son, Frank Folkerts, and this was a sufficient legal consideration. (Chapter 98, art. II, sec. 25, Hurd's Revised Statutes, J. & A. ¶ 7664.) And if legally a sufficient consideration for appellant's son, as maker, under the authorities referred to, it was also legally a sufficient consideration for the obligation assumed by appellant in signing it whether his obligation be that of joint principal, maker or surety.

Complaint is also made by appellant because the court refused to hold certain propositions of law, especially propositions numbers 7 and 11. Proposition 11 is based on an assumed state of facts, and undoubt-

edly the court found that those assumed facts did not agree with the actual facts, as shown by the evidence. It was not error to refuse to hold this proposition. (*Chicago & W. M. Ry. Co. v. Hull,* 76 Ill. App. 409.) It may also be said in this connection that a conclusion of law based upon an assumed state of facts is a mere abstract proposition, and rulings on abstract propositions, even if incorrect, are harmless error. Incorrect rulings on abstract propositions of law are harmless error where the judgment is in accordance with the law and evidence governing the case. (*Niagara Fire Ins. Co. v. Bishop,* 154 Ill. 9; *First Nat. Bank of Galesburg v. Clark,* 143 Ill. 83; *Lanter v. Hartman,* 95 Ill. App. 80; *Famous Mfg. Co. v. Wilcox,* 80 Ill. App. 54, affirmed in 180 Ill. 246; *Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co.,* 146 Ill. App. 350; *Stone v. Mulvaine,* 119 Ill. App. 443; *Moffitt-West Drug Co. v. Aldrich,* 87 Ill. App. 184.)

Proposition No. 7 embodied the question as to whether appellant was or was not a principal maker of the note in controversy. This question was not an issue in the case, and a finding on it was not necessary nor material in passing on the merits of the case. Assuming, therefore, that the trial court should have held this proposition as a matter of law, no error was committed in its refusal for which the judgment should be reversed, because the decision of the case depended entirely on whether or not appellant had proven his defenses. What the Supreme Court said in the case of *Stowell v. Moore,* is particularly applicable to this situation: "It is also claimed the court erred in refusing to hold as law certain propositions submitted by appellant. It will not be necessary to inquire whether the different propositions submitted by appellant contained correct principles of law, as the decision of that question would not necessarily change the judgment rendered in the case. The decision of the case depended entirely upon the view the court might take of

the evidence. If the evidence of the defendant was relied upon, then no recovery could be had. If, on the other hand, the evidence of the plaintiff, which was in direct conflict with that of the defendant, was received as the more credible, then the judgment would necessarily be in his favor. Under such circumstances it was immaterial what view the court might take of the abstract propositions of law submitted by appellant. As appellant was, therefore, in no manner injured by the decision of the court refusing the propositions submitted, we cannot on that ground reverse the judgment. (*Stowell v. Moore,* 89 Ill. 563.)

We are clearly of opinion that the judgment rendered in this case accords with the law applicable thereto, and is sustained by a preponderance of the evidence. The record does not show any reversible error, and the judgment should therefore be affirmed.

Affirmed.

Johnson Oil Refining Company, Appellant, v. Galesburg Railway, Lighting & Power Company, Appellee.

Gen. No. 6,181. (Not to be reported in full.)

Appeal from the Circuit Court of Knox county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Action by the Johnson Oil Refining Company, a corporation, plaintiff, against the Galesburg Railway, Lighting & Power Company, a corporation, defendant, to recover damages resulting from a collision of the plaintiff's auto-truck with the defendant's street

car. From a judgment for defendant, plaintiff appeals.

M. J. DAUGHERTY and MARSH & MARTIN, for appellant.

HARDY & HARDY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1410*—*when verdict not disturbed as against weight of evidence.* The verdict of the jury on the question of negligence of the defendant and contributory negligence of the plaintiff will not be disturbed on appeal unless clearly and manifestly against the weight of the evidence.

2. STREET RAILROADS, § 131*—*when evidence sufficient to show that defendant not negligent in injuring auto-truck.* In an action for damages to an auto-truck, resulting from a collision with an overtaking street car at a street intersection, evidence *held* not to justify interference with a finding of the jury in favor of the defendant on the question of its negligence.

3. STREET RAILROADS, § 131*—*when evidence sufficient to show contributory negligence of driver of auto-truck.* In an action for damages to an auto-truck, resulting from a collision with an overtaking street car, evidence *held* sufficient to show contributory negligence of plaintiff.

4. STREET RAILROADS, § 117*—*when city traffic ordinances admissible in action for damages for negligent collision.* In an action for damages to an automobile, resulting from a collision with an overtaking street car at a sheet intersection, city traffic ordinances applicable to the facts in issue *held* properly admitted in evidence.

5. MUNICIPAL CORPORATIONS, § 88*—*what power to regulate traffic by ordinance.* Under J. & A. ¶ 1334 (9), a city may pass reasonable ordinances regulating traffic in its streets.

6. MUNICIPAL CORPORATIONS, § 85*—*when ordinance requiring signals by drivers of vehicles valid.* A city ordinance requiring of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

drivers of vehicles that "in turning while in motion or in starting to turn from a standstill, a signal shall be given by indicating with the whip or hand, the direction in which the turn is to be made," *held* reasonable and valid.

7. MUNICIPAL CORPORATIONS, § 85*—*when ordinance regulating traffic valid.* A city ordinance providing that "traffic on the east and west streets shall have the right of way over traffic on the north and south streets," *held* reasonable and valid.

8. STREET RAILROADS, § 144*—*when instruction on contributory negligence of driver of auto-truck correct.* In an action for damages to an auto-truck, resulting from a collision with an overtaking street car at a street intersection, an instruction that if the truck driver was guilty of contributory negligence the plaintiff could not recover, *held* to properly submit such question to the jury.

9. STREET RAILROADS, § 144*—*when instructions on contributory negligence of driver of auto-truck correct.* In an action for damages to an auto-truck, resulting from collision with a street car, an instruction that the burden was on the plaintiff to establish by a preponderance of the evidence that he was in the exercise of due care and that the defendant was guilty of negligence, *held*, when read in connection with other instructions, to sufficiently fix the time when the plaintiff should have been exercising due care for his own safety and not to eliminate the proposition of equal rights of parties at the crossing.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William Friedberg, Appellant, v. Clarence E. DePew, trading as "Practical Advertising Company," and John R. Henderson, Sheriff, Appellees.

Gen. No. 6,190. (Not to be reported in full.)

Appeal from the Circuit Court of Kendall county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916. Rehearing denied May 12, 1916.

Statement of the Case.

Bill in equity filed by William Friedberg, complainant, to restrain Clarence E. DePew, trading as the "Practical Advertising Company," and John R. Henderson, as sheriff of Kendall county, Illinois, defendants, from enforcement of an execution issued upon a judgment entered by confession against the complainant. From an order sustaining a demurrer to the bill and a decree dismissing it for want of equity, the complainant appeals.

The bill alleged that DePew entered into a contract with complainant through complainant's agent whereby DePew, by the name of "Practical Advertising Company," agreed to furnish to complainant certain articles of merchandise, and perform certain acts to benefit complainant's business, the complainant being a merchant, and that DePew guarantied thereby to increase complainant's business. A copy of the contract referred to was attached to the bill as an exhibit, but it appeared from the bill that such exhibit was presumably only a part of the entire contract and was the part signed by the complainant, but that evidently at the same time complainant signed another paper, which was not attached to the bill.

It further alleged, in substance, that DePew procured to be entered a pretended judgment against him without the personal knowledge of complainant, and

that later, a pretended execution was issued upon said pretended judgment and placed in the hands of the sheriff for service, who served the same upon complainant and then levied it upon certain property of complainant; that the service of the execution on complainant was the first notice "actual, constructive or otherwise," which complainant had of the existence of the judgment, no summons or other process having been served upon him previous to the entering of the judgment, and that the court had adjourned for the term at which judgment had been taken before the time mentioned, and that it was only from the alleged pretended execution that he learned that the judgment had been so recovered against him by DePew in an action of "assumpsit-confession."

The bill also stated that complainant never, to his knowledge, executed or signed any judgment note authorizing the judgment, and that in case such judgment note ever existed containing his signature, such signature was a forgery; or, if genuine, it was obtained by misrepresentation, fraud, false pretenses and circumvention; that the only paper presented to him for approval or execution at the time the contract was negotiated was represented by Depew's agent to be a simple contract, and that if such alleged pretended judgment was taken against complainant and indicated by the alleged pretended execution, the same was and is fraudulent, and should be set aside as null and void.

The bill then prayed that the alleged pretended execution and levy be set aside, and that the sheriff and DePew be restrained by order of court from advertising or selling the premises, or authorizing or causing the same to be done, or otherwise attempting to enforce said alleged pretended judgment, etc.

BENJAMIN F. HERRINGTON and JOHN FITZGERALD, for appellant.

C. C. BIERMAN, for appellees.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 190*—*when separate papers considered as one instrument.* Where two papers signed are a part of the same transaction, one signed by one party to the contract and the other by the other party thereto, both papers constitute one contract and are to be considered as one instrument.

2. JUDGMENT, § 343*—*when bill to restrain enforcement of execution on judgment by confession defective.* In a suit to restrain the enforcement of an execution on a judgment alleged to have been entered by confession upon a pretended power of attorney, purporting to have been signed by the complainant, a bill alleging that the complainant did not, to his knowledge, execute such a power, or, if he did, its execution was procured by fraud, and having attached to it as an exhibit a paper alleged to evidence a contract entered into between the complainant and defendant, but which appeared to be only a part of an instrument evidencing the entire contract as entered into, *held* defective, inasmuch as the other part of the instrument might contain the power of attorney upon which such judgment was entered.

3. JUDGMENT, § 343*—*when bill to restrain enforcement of execution on judgment by confession on power of attorney insufficient.* In a bill to restrain the enforcement of an execution alleged to have been issued upon a pretended judgment entered upon a paper pretended to contain a power of attorney to confess judgment against the complainant, allegations that if the paper contained the complainant's signature it was a forgery, but if the signature was genuine it was obtained by misrepresentation, fraud, false pretenses and circumvention, *held* to be inconsistent, and neither a positive allegation that the signature was a forgery nor that it was genuine, but was obtained by fraud and misrepresentation, and insufficient in not stating facts upon which the claim of fraud and misrepresentation was based.

4. JUDGMENT, § 343*—*what bill to restrain enforcement of judgment on ground of fraud must contain.* While equity takes concurrent jurisdiction with law courts in matters of fraud, accident or mistake, the facts constituting such fraud, accident or mistake,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

as a defense to the enforcement of a judgment, must be set out in a bill to restrain its enforcement.

5. JUDGMENT, § 321*—*when injunction lies to restrain enforcement of execution.* To entitle one to an injunction to restrain the enforcement of an execution on the ground of fraud, accident or mistake, it must be evident not only that the complainant had a defense upon the merits to the action in which such judgment was entered, but that such defense has been lost to him without the loss being attributable to his own omission, negligence or default.

6. JUDGMENT, § 309*—*when injunction to restrain enforcement of judgment denied.* Injunction to restrain the enforcement of an execution on a judgment, the entry of which the complainant alleged first came to his knowledge after the close of the term at which it was entered, *held* properly denied, as the complainant had an adequate remedy at law inasmuch as he could, at the succeeding term, have filed a motion to vacate the judgment and for leave to plead.

7. JUDGMENT, § 80*—*when motion to vacate in time.* A motion to vacate a judgment by confession, filed at the next ensuing term after a confession of the judgment, is in apt time.

8. EXECUTION, § 104*—*what proper method of relief from improper levy of execution.* The proper method of relief against an improper levy of an execution is by application to the court issuing the execution to quash the levy.

9. INJUNCTION, § 170*—*what county a bill to restrain proceedings at law to be filed in.* A bill to restrain proceedings at law must be filed in the county in which such proceedings are being taken.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

August Cellarius, Individual and as Administrator, Appellant, v. Amanda Junker, Appellee.

Gen. No. 6,197. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Bill in equity filed by August Cellarius, in his individual capacity and as administrator of the estate of William Cellarius, complainant, against Amanda Junker, defendant, to set aside a change of beneficiary made by the deceased, for the benefit of defendant, in two life insurance policies, on the ground of fraud and undue influence, and to enjoin the payment of the policies to defendant. From a decree in favor of defendant, complainant appeals.

There was no evidence in the record to sustain the charges made in the bill, of fraud or undue influence, but there was evidence tending to show that the deceased, at the time of making the change of beneficiary, was mentally incompetent. A number of witnesses testified that the deceased, about the time he made the change, was incapacitated for the transaction of ordinary business, but the evidence was conflicting on that point.

ALBERT H. KRUSEMARK, for appellant.

S. J. DREW, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1398*—*when findings of jury approved by chancellor not disturbed.* Where, in a chancery case, it is not apparent from the record that error has been committed by the chancellor in sustaining the findings of fact of a jury, to which such issues have been submitted in an advisory capacity, such findings will not be disturbed on appeal.

2. CANCELLATION OF INSTRUMENTS, § 35*—*when evidence sufficient to show mental capacity.* In a suit in equity to set aside a change of beneficiaries of life insurance policies made on request of the insured, on the ground that he did not have sufficient mental capacity at the time, evidence *held* sufficient to sustain a finding that he had such capacity.

3. CANCELLATION OF INSTRUMENTS, § 34*—*when evidence as to conduct of beneficiary of policy inadmissible.* In a suit in equity to set aside the substitution, as beneficiary, by the insured of one designated by him, in his request for such substitution, as his "fiancee," where it was claimed by the complainant that such beneficiary was not the insured's fiancee, evidence that she was playing cards, laughing and having a good time at the time the insured was in a dying condition, *held* properly excluded, it not being contradictory of anything that had been testified to, and having no bearing on the issues in the case.

4. INSTRUCTIONS, § 120*—*when properly refused.* An instruction is properly refused where there is no evidence on which to base it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William Rako, Appellee, v. Elgin, Joliet & Eastern Railway Company, Appellant.

Gen. No. 6,214. (Not to be reported in full.)

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1915. Reversed with finding of facts. Opinion filed April 14, 1916.

Statement of the Case.

Action by William Rako, plaintiff, against the Elgin, Joliet & Eastern Railway Company and G. Holland, defendants, to recover damages for sickness and death of plaintiff's cows. From a judgment for plaintiff against the defendant railroad company, the latter appeals.

KNAPP & CAMPBELL and ROY R. PHILLIPS, for appellant; J. L. EARLYWINE, of counsel.

FISHER & PERCE, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

ANIMALS, § 43*—*when evidence sufficient to show that fence not destroyed by defendant.* Where the plaintiff, in an action for damages for death and sickness of his cows, claimed that owing to the defendant's servants having destroyed a division fence between the plaintiff's field, in which his cows had been confined, and his neighbor's field, the cows got into the latter field and suffered injuries from eating green corn growing there, evidence *held* not to show that the fence was destroyed by the defendant's servants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

William Fleming and Jane Fleming, Appellees, v. Elgin, Joliet & Eastern Railway Company, Appellant.

Gen. No. 6,042. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed April 14, 1916.

Statement of the Case.

Action by William Fleming and Jane Fleming, plaintiffs, against the Elgin, Joliet & Eastern Railway Company, defendant, for damages to plaintiffs' real estate caused by elevation of the defendant's tracks. From a judgment for plaintiffs, defendant appeals.

KNAPP & CAMPBELL and O'DONNELL, DONOVAN & BRAY, for appellant; JOHN R. COCHRAN, of counsel.

S. J. DREW, for appellees.

PER CURIAM.

Abstract of the Decision.

APPEAL AND ERROR, § 1755*—*when judgment affirmed by operation of law.* Where one of the judges of the Appellate Court, before which an appeal is heard, tried the case in the court below and the other two judges are divided in opinion upon the question whether the judgment should be affirmed or reversed, the judgment is affirmed by operation of law.

DIBELL, P. J., took no part in this decision.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Peter Zukas, Appellee, v. Appleton Manufacturing Company, Appellant.

Gen. No. 6,140. (Not to be reported in full.)

APPEAL AND ERROR, § 369*—*when party trying case on erroneous theory may not complain.* Where, in an action at common law for injuries to an employee which were within the scope of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475 (1) *et seq.*], the plaintiff in his declaration made no reference to such act and the defendant pleaded the general issue, and no reference was made to the act in the trial of the case except when the defendant's objection to the plaintiff's offered proof that the defendant had elected not to pay compensation under the act was sustained, and the common-law defenses were presented and passed upon and the case tried throughout on the theory of a common-law action with the acquiescence of both parties, the defendant's assignment of error that, there being no allegation or proof that the parties were not operating under the act, the trial court was without jurisdiction, *held* without merit.

Appeal from the Circuit Court of Kane county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 19, 1916.

THOMAS C. ANGERSTEIN, for appellant; ADRIAN F. SHERMAN, of counsel.

SCHUYLER F. LYNN, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

October 20, 1913, appellee, Peter Zukas, a minor, was employed by appellant, Appleton Manufacturing Company, in its foundry at Batavia, Illinois, and in the course of such employment was injured because of an explosion caused by dumping the cupola. The business was clearly within the provisions of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

¶ 5475 (1) *et seq.*] and under section 2 of that Act appellant is presumed to have elected to provide and pay compensation according to its provisions. Section 6 abolishes all common-law or statutory right to recover damages for injuries sustained by an employee covered by the act other than the compensation therein provided. The employer is given the privilege of rejecting the provisions of the act, and if he exercises that right, the employee has no option. If the employer accepts the provisions of the act then the employee has the right to reject its provisions. If the employer rejects the provisions, a common-law action for damages may be brought and tried with certain defenses theretofore existing denied him. If the employer accepts and the employee rejects the provisions, then a common-law action may be brought subject to common-law defenses. In the absence of any showing to the contrary, the presumption is that the parties are operating under the provisions of the act. In this respect the Statute of 1913 does not materially differ from the previous Act of 1911. If the parties were not operating under the act the common-law action could only be maintained by the plaintiff's averring and proving that fact. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480 [5 N. C. C. A. 419]; *Krisman v. Johnston City & Big Muddy Coal & Mining Co.*, 190 Ill. App. 612; *Synkus v. Big Muddy Coal & Iron Co.*, 190 Ill. App. 602; *Favro v. Superior Coal Co.*, 188 Ill. App. 203. June 12, 1914, Zukas, by his next friend, began this common-law suit to recover for that injury, and filed a declaration in case entirely ignoring the existence of the Compensation Act. Appellant pleaded the general issue. There was a jury trial with verdict and judgment of $2,500 for the plaintiff. No reference was made to the act on the trial except the plaintiff offered to prove that the defendant had elected, as provided in section 2, not to pay compensation under the provisions of the act, which proof was objected to by the defendant and

the objection sustained on the ground that there was no foundation for it in the pleadings. The common-law defenses of assumed risk and contributory negligence were presented by the defendant and passed upon. Instructions were asked and given thereon, although if it were true that appellant had rejected the provisions of the act, these questions were excluded by section 3. The court was asked by the defendant at the close of plaintiff's evidence to direct a verdict; and again at the close of all the evidence, and reasons in writing assigned therefor, with no reference directly or indirectly to the defense that the common-law right of recovery was abolished by statute. Points in writing were filed in support of defendant's motion for a new trial with no reference to that defense. In short, the defendant not only acquiesced in the plaintiff's theory that the Compensation Act could be utterly ignored, but actively aided in establishing that theory on the trial of the case. It, however, assigns here as error that "there being no allegation or proof that plaintiff and defendant were not operating under the Workmen's Compensation Act of Illinois, the court was without jurisdiction, and the court erred in assuming jurisdiction." Appellee answers that appellant should not now, on appeal, be permitted to raise that question. This is the controlling question presented by the record here. It is not much argued by counsel. At first blush it seems absurd that a plaintiff could be permitted to hold a judgment on a right of action that has been expressly abolished by statute before the time of the grievance complained of; but the general rule, subject to few exceptions, is that questions of whatever nature not raised and properly preserved for review in the trial court will not be noticed on appeal. 3 Corpus Juris 689. The subject is exhaustively treated in that work under the head of "Presentation and Reservation in Lower Court of Grounds of Review." The main

exception to the rule is want of jurisdiction. Id. 752. It was held in *City of Mattoon v. Noyes*, 218 Ill. 594, 597, that a defense not made in the court below will not be considered on appeal, citing earlier authorities. This rule is recognized in *City of Chicago v. Duffy*, 179 Ill. 447, 456, and in *People v. Hanson*, 150 Ill. 122, 127. In *Illinois Cent. R. Co. v. Heisner*, 192 Ill. 571, 573, the litigants proceeded in the trial of the cause upon the theory that it was controlled by a question of fact, and the court said: "Under a familiar rule, the attitude of the parties remains the same in this as in the trial court, and the controversy between them is to be determined on the theory which they adopted and proceeded upon in the trial court," and the court proceeded to determine the cause upon that theory, expressly refusing to render any opinion whether the theory was correct or not. In *Grubb v. Milan*, 249 Ill. 456, 463, the case was tried on inconsistent theories, sometimes as an action in assumpsit, and at others as an action on the case for fraud and deceit. The defendant did not object and it was held that he could not, on appeal, complain. In *Davis v. Illinois Collieries Co.*, 232 Ill. 284, 291, it was said: "A party cannot, in a reviewing tribunal, succeed upon a theory of the law inconsistent with that upon which he tried his cause in the *nisi prius* court." This same rule is recognized in *City of Chicago v. University of Chicago*, 228 Ill. 605. In *Oliver v. Oliver*, 179 Ill. 9, 14, it was held that a party could not complain of an erroneous decree "as it was an error that he asked the court to commit," citing earlier Illinois authorities. In *Mueller v. Rosen*, 179 Ill. 130, the defendant was not permitted to interpose a clause in a contract prohibiting recovery except on a condition precedent, because he did not present that defense below. In *Winnard v. Clinton*, 233 Ill. 320, the defendant was denied the right to change his position on appeal, as also in *Jones v. Knights of Honor*, 236 Ill. 113, and *N. K. Fairbank Co.*

v. Nicolai, 167 Ill. 242. In the latter case the court said the defendant "cannot now be permitted to abandon the theory to which it assented on the trial and substitute another." In *Cleveland, C., C. & St. L. Ry. Co. v. Stephens,* 74 Ill. App. 586, 594, the court said: "Both parties elected to pursue the same method of proofs; and as to measure of damages, both parties asked and received the same character of instructions. Appellant did not ask the court to give the rule now contended for, the case was not tried upon that theory, nor was any request made to the court to have it tried. The question was in no manner raised in the Circuit Court." The general principles applicable are stated as follows in Corpus Juris. A defendant cannot urge a defense in the Appellate Court inconsistent with the defense or defenses he relied upon in the court below. 3 Corpus Juris 698. An objection to the validity of a contract or instrument in suit cannot be urged for the first time in the Appellate Court. Id. 700. A party cannot raise the objection that a contract ordered was erroneously construed, or that the court found erroneously as to its existence or terms, where no such question was raised by the pleadings, or otherwise, in the lower court. Id. 703. That notice of an injury was not given to a city or other municipality before bringing suit, or that a notice was insufficient, that there was no tender or an insufficient tender, or that plaintiff has otherwise failed to comply with or perform a condition precedent to his right to maintain the action, cannot be raised for the first time on appeal. Id. 706. Objection that plaintiff could not recover for extra work under the contract in suit because of the provision in the suit for arbitration in relation thereto, cannot be raised for the first time on appeal. Id. 707. Where a party contends in the trial court that a particular section of the statute of limitations is applicable, he cannot, on appeal, shift his position and urge that a different section applies. Id. 710. The constitutional-

ity of a statute cannot be first questioned on appeal when it depends upon questions of fact as well as of law. Id. 711. A party cannot, on appeal, assume an attitude inconsistent with that taken by him on the trial. Parties are restricted to the theory on which the cause was prosecuted or defended in the court below. Id. 718. This rule applies to both prosecution and defense. Id. 720. A party is bound in the Appellate Court as to the nature and form of the action or proceeding by the theory on which the pleadings were construed and the action of proceeding was tried in the court below. Id. 723. Where an action or proceeding is treated in the trial court as having been brought under a particular statute, that theory will be adhered to on appeal. And where an action is tried as based on a statute, it will not be treated on appeal as an action at common law. Id. 725. Even on the question of jurisdiction where a court has general jurisdiction of a class of cases, an objection that because of irregularities or other special circumstances it had no jurisdiction of the particular case belonging to that class, or that it had no jurisdiction to render the particular judgment, must generally have been made in the court below. Id. 753.

The trial court had jurisdiction of the parties and of a common-law action on the case to recover damages for personal injury. Under the pleadings and the evidence there could properly be no recovery in this case had the defense here first suggested been made in the trial court. Where a defense is denied by a reviewing court because not presented in the court below, the plaintiff is permitted to recover where he perhaps, or certainly, was not entitled to recover had the defense been there made. We conclude that appellant cannot be heard now to complain that the case was tried under the wrong theory of the law. On an examination of the record we are of the opinion that had there been no question of the Employers' Liability Act involved, no

substantial error was committed in the trial of the case. For the reasons above stated the judgment is affirmed.

Affirmed.

George Kopf, Appellee, v. Amos Yordy, Appellant.

Gen. No. 6,090.

1. BILLS AND NOTES, § 165*—*what nature of liability of indorser.* In an action by the payee against an indorser of a promissory note, it is not a prerequisite to recovery that the plaintiff shall have first proceeded against the makers thereof.

2. PLEADING, § 108*—*when special plea insufficient.* A demurrer to a special plea presenting matters which were already at issue under the general issue, *held* properly sustained.

3. PLEADING, § 108*—*when special plea demurrable as presenting questions covered by general issue.* In an action against an indorser on a promissory note, a plea alleging that the plaintiff did not present the note to the makers for payment on the day it became due and gave no notice of its nonpayment or dishonor to the defendant, and made no demand for payment on the defendant on the day it became due, nor for a long time thereafter, etc., *held* bad on demurrer, in that it presented matters already at issue under the general issue.

4. BILLS AND NOTES, § 185*—*when delay in recording trust deed securing note is defense available to indorser.* In an action on a promissory note against an indorser who indorsed it at the time of its delivery to the plaintiff at his request, and which was secured by a trust deed delivered therewith to the plaintiff, *held* that the delay of the plaintiff to record such deed until after a prior lien had been secured on the property by the recording of another trust deed thereon would have been a defense, if properly pleaded, to the extent of the injury suffered by the defendant by reason of such delay.

5. PLEADING, § 102*—*when special plea presenting partial defense demurrable.* A special plea which purports to present a defense to the whole of the plaintiff's demand but which, in fact, amounts to only a partial defense is bad on demurrer.

6. BILLS AND NOTES, § 165*—*when signer liable as indorser.* One

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

who indorsed a note at the request of another to induce him to accept it, *held* liable as an indorser.

7. PLEADING, § 409*—*when parol evidence inadmissible under general issue.* In an action against an indorser of a promissory note where the only issue presented was the general issue, parol evidence of what occurred at the time of the indorsement *held* inadmissible.

Appeal from the Circuit Court of Stephenson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the April term 1915. Reversed and remanded. Opinion filed April 19, 1916.

WILLIAM N. CRONKRITE and ROBERT A. HUNTER, for appellant.

R. R. TIFFANY, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

In this case an appeal was taken from a judgment rendered in the Circuit Court of Stephenson county in the sum of $1,605 and costs of suit against the appellant, Amos Yordy, as indorser of a promissory note. The suit was brought in assumpsit by the appellee, George Kopf, against the appellant as indorser, and Robert R. Prall and Vina W. Prall as makers of the note. The note was for the principal sum of $1,500, payable to the order of the makers, dated October 12, 1912, and indorsed by them and by the appellant, Amos Yordy, before its delivery to appellee. It was secured by a trust deed made to Ed. Redington, trustee, of even date with the note, on a lot in the City of Freeport, and recites that fact on its face.

The appellant, Amos Yordy, and the appellee, George Kopf, both reside in the Village of Shannon, in Carroll county, where appellant was engaged in the real estate and loan business. Appellant negotiated this loan from appellee for Robert R. Prall and his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

wife, Vina Prall, who were about to build a house upon the lot described in the trust deed, and wanted to use the money loaned for that purpose. Pursuant to this negotiation, appellant, appellee and Robert R. Prall and wife, met at the office of Taylor & Frick, in Freeport, where the note and trust deed were drawn up and signed by the parties. At the time of the negotiation of the note, appellee insisted that appellant should also indorse the note before he would take the loan; and this was done, appellant indorsing his name on the note under the indorsement of the makers prior to its delivery to appellee.

The money loaned was paid over to the makers of the note in sums of $500 on three successive dates, the final payment being made on January 25, 1913. The trust deed, which was executed by the makers of the note and given to secure the payment of the loan, was delivered to appellee, and at the time of its execution and delivery to appellee was a first lien upon the lot described therein, which, with the house that had been constructed thereon, had a market value of about $2,600. The appellee did not record the trust deed, which had been delivered to him, and which he admits was in his possession January 25, 1913, until December 9, 1913. In the meantime, another mortgage made by Robert R. Prall and his wife to John Schiller on the 27th day of October, 1913, for the sum of $1,800 was recorded, and thereby became a lien prior to the lien of the trust deed held by appellee.

The original declaration filed was found insufficient on demurrer, and an amended declaration was filed containing four counts, the first count charging appellant with liability on said note as indorser, the second count charging him with liability as accommodation indorser, the third count charging him with liability as guarantor of the note, the fourth count also, in effect, charging appellee with liability as indorser. A demurrer was filed to the amended declaration and sus-

tained by the court; thereupon appellee elected to stand by the second, third and fourth counts of his amended declaration, but took leave to amend the first count, and he amended this count by inserting an allegation to the effect that the note in question was presented to the appellant for payment on the 13th day of October, 1913, and that he notified appellant on the same day that the note had been presented to the makers, Robert R. Prall and Vina, his wife, for payment, and that they had refused to pay the same. Appellant demurred to this amended first count of the amended declaration, but the demurrer was overruled. The appellant then pleaded the general issue and three special pleas. A demurrer was filed by appellee to all the pleas and the court sustained the demurred to all the special pleas and overruled it as to the first plea, which was the general issue, and error is assigned because the court sustained the demurrer to the special pleas.

The second special plea averred that the appellee did not proceed against the makers of the note with due diligence, in the ordinary course of the law to recover a judgment, and by execution to collect the amount due on said note from the makers, and that thereby he forfeited his right to exact payment of the amount due on said note from appellant. It was not a prerequisite that appellee should have first proceeded against the makers, as set forth in the plea. Section 84 of the Negotiable Instruments Act (J. & A. ¶ 7724) provides that "When the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder." The demurrer was, therefore, properly sustained to this plea.

The third special plea alleged, as a defense, that the appellee did not present said note to the makers for payment on the day the note became due, and gave no notice of its nonpayment, or dishonor, to the appellee

in writing or orally, on the day it became due, or the day after, nor for a long time thereafter, and that no demand for payment was made on the appellant on said day the note became due, or the day after, nor for a long time thereafter, and that the appellee thereby forfeited his right to demand from appellant the amount of the note. This plea presented for issue matters which were already at issue under the general issue, and the demurrer was therefore properly sustained to this plea.

The first special plea is as follows: "And for the further plea in this behalf, this defendant says, that the plaintiff ought not to have his aforesaid action against him, this defendant, because he says that at the time of the execution of the note sued upon herein, to-wit: On October 12, 1912, the said plaintiff received from the said Robert R. Prall and Vina W. Prall, a trust deed to certain real estate, situated in the City of Freeport, and County of Stephenson, and described as follows, to-wit: Lot Seven (7) of Prall's Sub-division of Lot Ten (10) in Block One (1) of Coates' Addition to the City of Freeport, except the North one hundred fifty (150) feet of said Lot Ten (10); that said trust deed was given to secure the note sued upon herein; that the said real estate so described is, at the reasonable value of $2600.00 a sum much in excess of the amount of the note so sued upon, to-wit: The sum of $1500.00; that the said George Kopf, plaintiff herein, neglected and refused to place the said trust deed of record in the office of the Circuit Clerk of the County of Stephenson and State of Illinois, until the ninth day of December, 1914; that before the said plaintiff placed the said trust deed of record the said Robert R. Prall and wife conveyed the said property to John Schiller by mortgage, in the sum of $1800.00; that the said John Schiller placed the same mortgage of record in the said Recorder's office of Stephenson County, Illinois, on the 27th day of October, 1913, thereby making it a

prior lien to the lien of the trust deed given by the said Robert R. Prall and Vina W. Prall, to secure the note sued on herein; that through the negligence and refusal of the said plaintiff to so place the trust deed of record he lost the security for the said note, except in so far as the same may be a second lien upon the above described real estate; that the security of the said trust deed on the said real estate is ample to secure the whole sum of the said note, and had said trust deed been placed on record in said county, as aforesaid, the said plaintiff could have recovered the full sum of the said note from the security given him by said trust deed upon said real estate; and so the defendant says that by reason of the negligence and refusal of the said plaintiff to place the said trust deed of record, and thereby secure his lien upon the said real estate, the said plaintiff ought not to have his aforesaid action against him, and this the defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his aforesaid action against him, etc."

This plea contains competent matters of defense. The appellant, when he placed his signature upon the note, incurred the legal obligation of an indorser, and the assumption of this obligation put him in the actual position of surety for the payment of the debt represented by the note; and it is clear that he assumed this obligation on the strength of the assured fact of the trust deed security, which would practically indemnify him against suffering any loss by affixing his signature to the note. He had a right to rely on the benefit of this security, in signing the note, and upon the legal right with which he would become vested if compelled to pay the debt, namely, to become subrogated to the rights of appellee to the security and thus to utilize it in making himself whole. The security embodied in the trust deed was therefore held by appellee not only for his own benefit, but also for the benefit of appellant, and if appellee, by his laches, has deprived

the appellant of the benefit of this security, it is clear that appellant was injured thereby and would have the right to plead the injury suffered, and resulting from such laches or negligence, in defense, against a recovery by appellee on the note to the extent of the injury suffered. This is an equitable principle which has received repeated recognition and is generally enforced in courts of law. (*Heaton v. Hulbert*, 4 Ill. [3 Scam.] 491; *Hall v. Hoxsey*, 84 Ill. 619; *Kirkpatrick v. Howk*, 80 Ill. 126; *Rogers v. Trustees of Schools*, 46 Ill. 431; *Phares v. Barbour*, 49 Ill. 375.)

The matters of defense, however, set up in the plea show only a partial loss of security because of the alleged laches of the appellee, and therefore amount only to a partial defense to the action; but the plea professes to answer the whole of the declaration, and purports to present a defense to the whole of appellee's demand. Pleas of this character are obnoxious to general demurrer. *Dickerson v. Hendryx*, 88 Ill. 66; *People v. McCormack*, 68 Ill. 226; *City of Marshall v. Cleveland, C., C. & St. L. R. Co.*, 80 Ill. App. 531; *Morehead & Yeazel*, 10 Ill. App. 263. A demurrer was therefore properly sustained to this plea.

It is insisted by appellant that the Negotiable Instruments Act fixes the nature of the contract and liability of the appellant which resulted from the signing of his name on the back of the note in question, and therefore that the court erred in admitting evidence of what took place at the time appellant affixed his signature. It is true that evidence of contemporaneous verbal declarations and conversations cannot properly be admitted for the purpose of changing or varying a liability which the law attaches to a writing or contract. This was held in *Johnson v. Glover, infra*, where it was sought to hold the payee, who had indorsed a promissory note, to the liability of guarantor, because he had indorsed the note twice, and it was contended that the latter indorsement was made by him

as a guarantor. The court, in passing on the question raised, says: "Evidence was offered on the trial, and admitted over appellant's objections, that appellant, at the time he sold the note to Carton, agreed to guaranty it, and, for that purpose, wrote his name across the back of the note twice. * * * The general rule is, that the name of the payee appearing on the back of the instrument is evidence that he is an indorser, and proves that he assumed the liability of an indorser, as fully as if the agreement were written out in words. (*Mason v. Burton*, 54 Ill. 349; *Beattie v. Browne*, 64 id. 360; *Courtney et al. v. Hogan*, 93 id. 101.) Parol evidence is no more admissible to contradict or vary this contract than any other written contract. * * * But it is inadmissible to show that the parties intended a different contract than that implied by the law from their acts." (*Johnson v. Glover*, 121 Ill. 283.) To the same effect is *Hately v. Pike*, 162 Ill. 241, where the court again holds that as the contract and liability which arose from the act of indorsing a note, by a payee, was fixed by law as that of an indorser, parol evidence could not properly be admitted to change or vary such liability, and it finally disposes of the question in these words: "Parol evidence was improperly admitted to contradict appellee's contract as indorser and to show that he made a contract as guarantor; and the instructions which authorized the jury to find from such evidence, whether or not appellee put his signature upon the back of the note for the purpose of guaranteeing its payment, were improperly given."

In *Cozzens v. Chicago Hydraulic-Press Brick Co.*, 166 Ill. 213, the court again emphasized that where the legal liability arising from the placing of a signature on the back of a note is that of an indorser, parol evidence is inadmissible to change such liability into that of a guarantor. In this case the appellant by putting his signature on the back of the note in question legally incurred the liability of indorser. (Section 63,

art. V, ch. 98, Revised Statutes, J. & A. ¶ 7702.) Appellant's liability, aside from the statute, under the circumstances presented by the evidence, would have been that of an indorser. (*Bogue v. Melick,* 25 Ill. 91; *Finley v. Green,* 85 Ill. 536; *Blatchford v. Milliken,* 35 Ill. 439; *Chicago Trust & Savings Bank v. Nordgren,* 157 Ill. 667; *Milligan v. Holbrook,* 168 Ill. 343.)

While oral evidence cannot properly be admitted to change or vary the terms of a writing, or a legal liability, such evidence is often competent, in connection with the execution of written instruments. It is competent, for example, to show by oral evidence the execution of a written instrument. (*Morton v. Murray,* 176 Ill. 63.) And oral evidence of what took place at the time of the signing of a written instrument may sometimes be a part of the *res gestæ.* (*Paul v. Berry,* 78 Ill. 161; *Bushnell v. Wood,* 85 Ill. 88.) And such evidence is admissible for the purpose of establishing a trust, in connection with a written instrument, or showing the circumstances under which an indorsement was made, or to prove fraud. (*Johnson v. Glover, supra.*)

In this case, where the only issue presented for trial was the general issue, oral evidence was not competent, and it was error to admit it. The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

Edward B. Kreis, Appellant, v. County of Rock Island et al., Appellees.

Gen. No. 6,168. (Not to be reported in full.)

Appeal from the Circuit Court of Rock Island county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed April 26, 1916.

Statement of the Case.

Bill in equity filed by Edward B. Kreis, complainant, against the County of Rock Island and others, defendants, to enjoin the county from building a jail. From a decree dismissing the bill, complainant appeals.

Edward B. Kreis, a citizen, real estate owner and taxpayer of the City of Rock Island, filed a bill in equity against the County of Rock Island, its supervisors and its jail building committee, to enjoin the county from building a new jail on the west side of the public square, and gave notice to defendants of an application for a temporary injunction. Defendants appeared and filed affidavits denying many of the allegations of the bill. Complainant moved for a rule on defendants to plead, answer or demur before the motion for an injunction was heard, and also moved to strike the affidavits filed by defendants from the files. Each motion was denied, the court heard the motion for an injunction upon the bill and affidavits and denied the motion and dismissed the bill. The affidavits and exhibits thereto were preserved by a certificate of evidence.

The bill charged that the County of Rock Island was indebted beyond the constitutional limit and that the cost of the new jail and other matters intended to be built in connection therewith would be so great that,

even with the avails of the bond issue which the people had voted, still the indebtedness to be created by said work would be beyond the constitutional authority of the county to create.

J. T. & S. R. KENWORTHY and JAMES F. MURPHY, for appellant.

FLOYD E. THOMPSON and SEARLE & MARSHALL, for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION—*when denial of motions erroneous.* On an application for a temporary injunction where the defendants appeared and filed affidavits denying allegations of the bill, and the complainant moved for a rule on defendants to plead, answer or demur before the motion for the injunction was heard, and to strike the affidavits from the files, *held* denial of such motion was error.

2. INJUNCTION—*when dismissal of bill on denial of temporary injunction improper.* On denial of a temporary injunction, the court should not dismiss the bill before any pleading by the defendants, unless it appears from the bill that it cannot be so amended as to state a case in equity.

3. INJUNCTION, § 191*—*when bill for sufficient.* Allegations in a bill to enjoin a county from building a jail, stating the building thereof would raise the county's indebtedness beyond the constitutional limit, *held* sufficient unless questioned by demurrer.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Oscar Larson, Appellee, v. R. C. Judd, Appellant.

Gen. No. 6,172.

1. FRAUDULENT CONVEYANCES, § 15*—*what are goods and chattels within Bulk Sales Act.* Cattle, horses and tools used by a dairyman selling milk at retail are goods and chattels within the meaning of the Bulk Sales Act [Cal. Ill. St. Supp. 1916, ¶ 10021(1) *et seq.*].

2. FRAUDULENT CONVEYANCES, § 15*—*what does not constitute sale of major part of goods and chattels.* A sale by a dairyman of horses, wagons, harness, etc., *held* not a sale of the major part of his goods and chattels within the meaning of the Bulk Sales Act [Cal. Ill. St. Supp. 1916, ¶ 10021(1) *et seq.*]

3. FRAUDULENT CONVEYANCES, § 15*—*when sale of chattels not in violation of Bulk Sales Act.* After a sale of the major part of a vendor's goods and chattels in violation of the Bulk Sales Act [Cal. Ill. St. Supp. 1916, ¶ 10021(1) *et seq.*], a sale of the major part of the remainder is not in violation of such act.

4. FRAUDULENT CONVEYANCES, § 15*—*when sale of chattels not within Bulk Sales Act.* Where a dairyman sold all his cattle, which were the major part of his goods and chattels, *held* that his business therewith terminated so that a sale of part of the remainder was not within the Bulk Sales Act [Cal. Ill. St. Supp. 1916, ¶ 10021(1) *et seq.*].

Appeal from the County Court of Kane county; the Hon. S. N. HOOVER, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 26, 1916.

RUSSELL & MCNERNY and HARRY G. HEMPSTEAD, for appellant.

JAMES F. GALVIN and CHARLES H. DARLING, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

On March 3, 1915, R. C. Judd, the appellant, obtained a judgment by confession against one Robert Larson

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and caused an execution issued thereon to be levied on horses before that time sold and delivered by the execution debtor to the appellee, Oscar Larson (not a relative of the vendor). There was a trial of right of property under the provisions of chapter 140a of our Revised Statutes (J. & A. ¶ 6814 *et seq.*) and a judgment in favor of the purchaser.

The vendor, Oscar Larson, had been engaged in the dairy business on a rented farm near Geneva, Illinois, selling milk at retail. His lease expired March 1, 1915. Prior to that date his property used in said business consisted of cattle, horses and farm implements. For the better understanding of the question presented here we divide it into three groups: (a) Twenty-one head of cattle, the major part of his property; (b) five horses, two wagons, two sets of double harness, one single harness, and a corn planter, worth $650; (c) sundry small articles, including household furniture worth $250. February 28th he sold the major part of his property (the cattle) to one Aiken, and delivered them on that or the succeeding day. On March 2nd he sold the articles enumerated in group "b" to the appellee for $650. The controlling question here is whether this sale to appellee was in violation of what is known as our Bulk Sales Act of 1913 (Hurd's St., ch. 38a, p. 906, Cal. Ill. St. Supp. 1916, ¶ 10021(1) *et seq.*), which provides: "That the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures, or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business shall be fraudulent and void as against the creditors of the said vendor," unless the provisions of that statute are complied with. There was no attempt here to comply with those provisions, therefore the question is whether the sale of item "b" of the property to appellee was a sale of the major part or the whole of the

goods and chattels of the vendor's business. We have no doubt that the act covered the business. The former Act of 1905 was held unconstitutional by the Supreme Court in *Charles J. Off & Co. v. Morehead,* 235 Ill. 40, because the property included in the act was only "stock of merchandise" which made it special protective legislation. The present act was held good in *G. S. Johnson Co. v. Beloosky,* 263 Ill. 363, and there said to apply to the "sale of any goods and chattels in bulk, otherwise than in the ordinary course of trade in the regular and usual prosecution of business." The Appellate Court of the First District in *Heslop v. Golden,* 189 Ill. App. 388, held that the present act does not cover the desks, chairs, filing cases, rugs, and other articles of office furniture owned and used by a man conducting an employment agency, because the vendor had no connection with or semblance to a mercantile establishment, and that the words in the act "other goods and chattels of the vendor's business" meant goods and chattels used in connection with the business of selling merchandise, commodities and other wares. The same court held in *H. S. Richardson Coal Co. v. Cermak,* 190 Ill. App. 106, that the act did not apply to the sale of a team of horses, including harness and wagon, which the vendor had been personally using to haul coal for others at a compensation of so much per ton, and said: "The act did not contemplate that one called on to render personal services cannot sell the chattels, goods or things that are appurtenant thereto unless the conditions imposed by said act are complied with. Otherwise a lawyer could not sell his library, a surgeon his instruments, a broker his office furniture, or a carpenter his tools, without compliance with such conditions." This construction of the statute is consistent with our conclusion that the cattle, horses and tools used by the vendor in his business were goods and chattels used in connection with his business of selling merchandise, commodities or other wares

(milk) and therefore within the provisions of the act. The goods and chattels of Robert Larson's business were the property first mentioned (Items "a," "b" and "c"), excluding household furniture and perhaps other items in group "c." The major part of those goods and chattels (the cattle) were sold to Aiken before the purchase by appellee of the horses and other items in group "b," therefore appellee did not buy the major part of the goods and chattels. There is no ground for connecting appellee in any way with the vendor's sale to Aiken of the major part of his property, therefore we are not called upon to say what might be the effect of the purchase by different vendees acting in concert of the whole or major part of such goods and chattels, no one vendee buying the major part thereof. If appellee had purchased the goods in item "c" before the sale to Aiken of the major part of the property, he would not have been within the prohibition of the statute because he would not have purchased the major part of the goods and chattels, and his purchase could not have been invalidated by some subsequent action of his vendor and some third person with which he had no connection.

We do not think the vendor's property left after the sale of the cows can be regarded as the goods and chattels of his business within the meaning of the statute, in determining what was the major part of his property that appellee was prohibited from buying except under the conditions imposed by the statute. But even if that view were adopted, the business of the vendor terminated before the purchase of item "b" of the property, therefore appellee was not purchasing goods and chattels used in the vendor's business.

In any reasonable view we take of the situation we are of the opinion that the purchase by appellee was not within the prohibition of the Bulk Sales Act, and therefore that the judgment should be affirmed.

Affirmed.

George J. Burkheimer, Defendant in Error, v. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.

Gen. No. 6,210. (Not to be reported in full.)

Error to the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 26, 1916.

Statement of the Case.

Action by George J. Burkheimer, plaintiff, against Chicago, Rock Island & Pacific Railway Company, defendant, to recover for personal injuries. From a judgment for plaintiff, defendant prosecutes a writ of error.

The plaintiff, a street car motorman, on a stormy night, drove his car onto the tracks of the defendant at a street crossing instead of stopping in accordance with his employer's rules before reaching the track and waiting for the conductor to go ahead and signal a clear track, and was struck by the defendant's train, admitted to have been running at a speed in excess of that permitted by an ordinance. A reversal was sought solely on the ground that the plaintiff was guilty of contributory negligence, and both parties requested either an affirmance of the judgment or reversal without remanding.

The plaintiff had worked for the Peoria Railway Company as motorman for about three weeks, and had no previous street car experience. His theory of the case was that he was intending to stop his car at the time in question, but that it was dark and snowing and he was relying on an electric light that the defendant maintained over the crossing to guide him as to the place to stop; that at the time the light was not burning and he, misled thereby, drove onto the crossing

without knowing where he was. The evidence was conflicting on the question whether it was snowing, and it tended to show that there were other means from which the plaintiff might have known that he was approaching the track.

STEVENS, MILLER & ELLIOTT, for plaintiff in error; M. L. BELL and A. B. ENOCH, of counsel.

SHEEN & GALBRAITH and C. N. MIHIGAN, for defendant in error.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 199*—*when verdict not directed.* A verdict may not be directed where to do so would necessitate the weighing of conflicting evidence.

2. APPEAL AND ERROR, § 1802*—*when cause remanded.* In an action for injuries to a street car motorman struck by a train at a railway crossing, evidence as to due care of plaintiff at the time of the accident, *held* not to justify the reversal of a judgment in his favor without remanding.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

C. V. O'Connor, Appellee, v. P. R. Kennedy, Appellant.

Gen. No. 6,171. (Not to be reported in full.)

Appeal from the Circuit Court of Boone county; the Hon. CLAIRE C. EDWARDS, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed April 26, 1916.

Statement of the Case.

Action by C. V. O'Connor, plaintiff, against P. R. Kennedy, defendant, to recover real estate commissions. From a judgment for plaintiff, defendant appeals.

After efforts on the part of defendant to sell his farm to a certain party had resulted in failure and negotiations had been broken off, the defendant, as claimed by the plaintiff, promised the latter certain commissions if he could get such party to buy the farm, the making of which promise, however, was denied by the defendant. After efforts on the part of the plaintiff to effect a sale to such party, a sale was finally made to him by the defendant.

JAMES M. HUFF and CHARLES W. FERGUSON, for appellant.

WILLIAM L. PIERCE, WILLIAM BIESTER and ALEXANDER J. STROM, for appellee.

MR. JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 37*—*when entitled to commissions upon procuring purchaser.* If, after negotiations between the owner of real estate and a prospective purchaser have been broken off, the owner, after

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

promising an agent that he will pay him commissions if he will get such prospective purchaser to buy the property, makes a sale to such purchaser after efforts of the agent had had the effect of bringing the parties to an understanding, such agent may recover the agreed commissions.

2. WITNESSES, § 209*—*when denial of cross-examination proper.* In an action for commissions for the sale of real estate, refusal to allow the plaintiff to be cross-examined as to details of his knowledge of the land sold, where he had not testified on such matters in his direct examination, and the purchaser was familiar with the land, *held* not error.

3. BROKERS, § 97*—*when instruction in action for commissions properly refused as misleading.* In an action to recover real estate commissions for a sale alleged to have been made by the owner, as a result of the plaintiff's efforts following an alleged promise by the owner to pay the plaintiff such commissions after the owner had failed to effect a sale to such purchaser with whom he had originally negotiated, without any introduction by the plaintiff, an instruction making it essential to a recovery that the purchaser should have been originally procured by the plaintiff, *held* properly refused as misleading.

4. APPEAL AND ERROR, § 1533*—*when error in spelling of word in instruction harmless.* Substitution of the word "affect" for "effect" in an instruction, *held* not reversible error.

5. BROKERS, § 97*—*when instruction on right to recover commissions correct.* In an action for commissions for the sale of real estate, an instruction that the plaintiff "is entitled to recover, if he was instrumental in bringing the buyer and seller together," *held* correct and not open to the objection that the jury might have inferred that it meant a mere physical bringing together.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Edward L. Herrick, Plaintiff in Error.

Gen. No. 6,229. (Not to be reported in full.)

Error to the County Court of McHenry county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed May 9, 1916.

Statement of the Case.

Information by the People of the State of Illinois, plaintiff, against Edward L. Herrick, defendant, charging him with wife abandonment and refusal to support his wife. From a conviction, defendant prosecutes a writ of error.

Defendant, Edward L. Herrick, was, on a trial by the court without a jury, found guilty and fined under an information filed by the State's Attorney in the County Court of McHenry county, September 24, 1915. The information as amended charged, that on to wit, the 24th day of May, 1914, at and within said county, Edward L. Herrick, the defendant, "wilfully, maliciously and without reasonable cause, did abandon in destitute and necessitous circumstances" his wife, Teresa Herrick, "and did then and there neglect and refuse to maintain and provide for her." This was a penal offense under the Wife Abandonment Act of 1903 (J. & A. ¶ 3431). The Legislature by an act approved June 24, 1915 (Laws of 1915, page 470) [Cal. Ill. St. Supp. 1916, ¶ 3433(1) *et seq.*], passed an act providing: "That every person who shall, without any reasonable cause, neglect or refuse to provide for the support or maintenance of his wife, said wife being in destitute or in necessitous circumstances," shall be punished, etc., omitting the offense of abandonment theretofore existing. This act was in force when the

present information was filed. It expressly repealed all other acts or parts of acts in conflict therewith.

The issue tried was raised by a plea of the defendant: "That he is not guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick in manner and form as charged in the said information, as amended." The finding of the court was that, "The said defendant, Edward L. Herrick, is guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances Teresa Herrick, in manner and form as charged in said information."

The evidence seemed to show that the defendant was a resident of the State of Wisconsin at the time the information was filed, and at the time the Act of 1915 came in force.

WAITE & DONOVAN, for plaintiff in error.

DAVID R. JOSLYN, for defendant in error.

PER CURIAM.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 275*—*when finding insufficient as basis for conviction for wife desertion.* On an information charging that the defendant "wilfully, maliciously and without reasonable cause, did abandon in destitute circumstances" his wife, "and did then and there neglect and refuse to maintain and provide for her," where the defendant pleaded: "That he is not guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and necessitous circumstances * * * [his wife] in manner and form as charged in the said information," even though the offense of abandoning, which was repealed before the information was filed, be considered as surplusage, a conviction cannot be sustained on a finding that "the said defendant, * * * is guilty of wilfully, maliciously and without reasonable cause abandoning in destitute and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

necessitous circumstances * * * [the wife] in manner and form as charged in said information," since no issue would have then been formed and there was no finding made on the charge of neglect or refusal to provide for the support of the wife as set out in the repealing statute in force at the time of the filing of the information.

2. HUSBAND AND WIFE—*when resident of another State not guilty of refusal to support wife.* Under Cal. Ill. St. Supp. 1916, ¶ 3433(1) *et seq.*, making refusal of a husband to support his wife a criminal offense, a conviction cannot be had of a husband who was a resident of another State at the time the act went into effect and at the time the information was filed.

George W. Clendenin, Appellee, v. Adams Express Company, Appellant.

Gen. No. 6,282. (Not to be reported in full.)

Appeal from the Circuit Court of Whiteside county; the Hon. JAMES S. BAUME, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed May 9, 1916.

Statement of the Case.

Action by George W. Clendenin, plaintiff, against Adams Express Company, defendant. Motion by defendant to quash a fee bill. From a refusal to quash the fee bill, defendant appeals.

The motion to quash and the proofs for and against said motion were not preserved by a bill of exceptions. The record proper did not disclose what particular item of the fee bill was assailed. The clerk copied into the record a stipulation of counsel setting up certain alleged facts.

H. C. WARD, for appellant.

A. A. WOLFERSPERGER, for appellee.

PER CURIAM.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Abstract of the Decision.

APPEAL AND ERROR, § 1341*—*when presumed that quashing of fee bill correct.* Where, on appeal from a ruling on a motion to quash a fee bill, neither the motion nor the proofs heard for or against it are preserved by bill of exceptions, the presumption is that the ruling was correct and the judgment will be affirmed.

David Strom, Appellee, v. Postal Telegraph-Cable Company, Appellant.

Gen. No. 6,243.

1. APPEAL AND ERROR, § 1265*—*when presumed that constitutional question not involved.* Where, after a constitutional question has been treated in briefs and arguments of counsel in a case before the Supreme Court, that court transfers the case to the Appellate Court, the latter court must assume that no constitutional question is involved.

2. WORKMEN'S COMPENSATION ACT, § 12*—*what plaintiff must aver and prove in action at common law.* Where an employer elects not to come under the Workmen's Compensation Act, his negligence, to form the basis of a recovery in an action at common law, must be averred and proved by the plaintiff.

3. WORKMEN'S COMPENSATION ACT, § 2*—*what is effect of election by employer not to come under act.* An employer who has elected not to come under the Workmen's Compensation Act is, when sued at common law by an employee, deprived of the entire defense of assumed risk, both known and unknown, ordinary and extra-ordinary.

4. WORKMEN'S COMPENSATION ACT, § 2*—*what is effect of election by employer not to come under act.* The Workmen's Compensation Act did not, by depriving an employer who should elect not to come under it of the common-law defense of assumed risk, thereby make him an insurer, since his negligence must be proved to make him liable for an injury to an employee.

5. WORKMEN'S COMPENSATION ACT, § 12*—*when instructions in action at common law correct.* In an action at common law by an

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

employee against his employer, who had elected not to come under the Workmen's Compensation Act, instructions *held* to properly inform the jury that a verdict against the defendant could not be rendered if the evidence failed to show that its negligence was the proximate cause of the plaintiff's injury.

6. WORKMEN'S COMPENSATION ACT, § 2*—*when master electing not to come under act liable for negligence.* In an action by a lineman against an employer who had elected not to come under the Workmen's Compensation Act, for injuries sustained as a result of his spur tearing out of a pole which he was climbing, thus causing him to fall, *held* that if the defendant was negligent in not providing the pole with iron spikes it would be liable, notwithstanding that the danger of climbing the pole with spurs was obvious to the plaintiff.

7. MASTER AND SERVANT, § 691*—*when evidence sufficient to show negligence of master.* In an action at common law by a lineman for injuries resulting from a fall from a pole alleged to have been caused by his spur tearing out of the pole, owing to its weakened condition, evidence *held* to justify a finding that the defendant, his employer, was negligent in not providing iron spikes or other appropriate means of climbing the pole other than the use of spurs.

8. MASTER AND SERVANT, § 789*—*when instruction erroneous as invading province of jury.* In an action at common law by a lineman against his employer for injuries sustained from a fall alleged to have been caused by the plaintiff's spur tearing out of a pole he was climbing, an instruction that the defendant owed the plaintiff no duty to place steps upon such pole, *held* properly refused, as such question of duty was for the jury and not for the court.

9. EVIDENCE, § 74*—*what admissible as part of res gestæ.* In an action by a lineman for injuries sustained as the result of a fall from a pole alleged to have been caused by his spur tearing out of a decayed place in the pole, evidence showing that the pole was not provided with spikes, *held* admissible as part of the *res gestæ*.

10. MASTER AND SERVANT, § 618*—*when refusal of evidence as to custom not erroneous.* In an action by a telegraph lineman for injuries resulting from a fall from a pole, where there was no question of a hidden defect therein, and the jury were instructed that the defendant employer would not be liable for injuries resulting from a hidden defect in the pole which it could not have reasonably discovered and repaired, the refusal to admit evidence of a general custom among companies operating pole lines to make no independent inspection of poles other than that made by linemen themselves, *held* not error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Strom v. Postal Telegraph-Cable Co., 200 Ill. App. 431.

11. MASTER AND SERVANT, § 800*—*when refusal of instruction proper.* In an action by a lineman for injuries resulting from a fall from a pole alleged to have resulted from the plaintiff's spur tearing out of a decayed place therein, *held* that the refusal of an instruction that there was no duty imposed on the defendant employer to inspect the pole was proper.

12. MASTER AND SERVANT, § 779*—*when refusal of instruction not error.* On the issue whether an injury to a lineman was caused by a certain defect in a pole which he was climbing, where the evidence thereon was not all circumstantial, *held* that the refusal of an instruction that to entitle the plaintiff to recover it was necessary not only that the circumstances should all concur to show that the injury was caused by such defect, but that they were inconsistent with any other rational theory, was not error.

13. DAMAGES, § 123*—*when verdict for personal injuries not excessive.* A verdict of $3,000 awarded a telegraph lineman for permanent injuries, resulting from a fall from a pole, involving a thickening and stiffening of an ankle and shortening of a limb, *held* not excessive.

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed May 24, 1916. *Certiorari* denied by Supreme Court (making opinion final).

JACOB E. DITTUS and JOHN H. SAVAGE, for appellant.

J. W. D'ARCY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

David Strom, the appellee, March 11, 1914, was in the employ of the appellant company as a lineman. His foreman ordered him to climb a telegraph pole in a public street in the City of Joliet for the purpose of removing one of the wires. Appellee was an experienced lineman, and used a pair of metal spurs such as are ordinarily used by linemen in climbing telegraph poles. He climbed about twenty-five feet from the ground and fell, suffering an impacted fracture of the lower base of the tibia of his right leg. He brought

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

this action to recover for that injury and had verdict and judgment for $3,000. The company prosecutes this appeal.

The declaration contained three counts. The first charged failure of the defendant to furnish a safe place to work and failure to exercise reasonable care to furnish wooden telegraph poles in reasonably safe condition and repair to sustain the weight of the plaintiff when climbing, standing or working with metal spurs. The second charged failure to inspect, repair and maintain reasonably safe and sound wooden telegraph poles so as not to injure the plaintiff when climbing, working or standing on spurs inserted in said poles, and that the pole in question was rotten, decayed, impaired, defective and unsafe for the plaintiff to work upon. The third charged a failure to provide reasonably safeguards on telegraph poles, or to place a ladder, steps or spikes in the poles on which linemen were required to climb so as to protect, support and sustain linemen when working and climbing in the service of the defendant; that the only means provided by defendant by which the plaintiff could ascend the poles was by the use of a metal spur strapped to each leg, and that when plaintiff was about to seat himself on the pole by the use of such spurs, and relying upon the pole to sustain his weight, and without knowledge of the defective condition of the wood in the pole, the wood underneath one of plaintiff's spurs broke out and gave way on account of the unsafe and decayed condition of the wood.

Each count alleged that the defendant was not operating under the Workmen's Compensation, and Employers' Liability Law of 1913. The defendant pleaded the general issue.

On the trial it was admitted that the defendant was not operating under the Workmen's Compensation Act. It appeared that the pole was about forty-two

feet out of the ground, eighteen inches in diameter at the surface, and tapered towards the top, and was about twelve and one-half inches in diameter at the point from which the plaintiff fell. It was a Michigan cedar pole in use since the line was built in May, 1902. On the top of the pole were three sets of double cross-arms, occupying a space of about four and one-half feet. Plaintiff's objective point was the top of the pole. About ten feet below the lower double cross-arm there was a single cross-arm. Plaintiff climbed to a point where he could reach with his hand this single cross-arm, having his right spur set in the pole. He reached up with his left hand to grasp the pole above the lower cross-arm, at the same time lifting his left foot. His right spur gave way and he slid down the pole with his arms around it, striking the ground first with his right foot. There is evidence tending to show that a chunk of the pole eight or ten inches long and perhaps two inches wide broke out from the pole at the point where the spur was inserted. Appellant's theory of the accident, which there is evidence tending to prove, is that there was a knot in the pole where the plaintiff inserted the right spur; that there were usually in poles knots that were hard so that it was difficult to drive a spur into them, and that workmen were usually careful to avoid such knots; that the accident happened because of the knot and the failure of care on the part of the plaintiff to avoid it. The plaintiff's theory is that the outside of the pole was much scarred and broken by constant climbing and therefore unsafe; that a piece of the wood, because of this weakened condition, gave way at the point where the spur was inserted and caused the accident. There is no question that the outside of the pole to the depth of the penetration of a spur was much marked and weakened, otherwise the pole was sound.

Section 3 of the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475 (3)] provides that

in actions to recover damages against an employer who shall elect not to provide and pay compensation according to the provisions of the act it shall not be a defense that, first, the employee assumed the risk of the employment; second, the injury or death was caused in whole or in part by the negligence of a fellow-servant; or, third, the injury or death was proximately caused by the contributory negligence of the employee. Appellant, while conceding that its business brought it within the provisions of the Compensation Act, takes the position that nevertheless the plaintiff necessarily agreed to assume all risks which are ordinarily and usually incident to the service, and if the injury was the result of one of the risks ordinarily incident to the work in which plaintiff was engaged, then he cannot recover. It offered instructions based on that theory, which were refused by the trial court, and prosecuted its appeal to the Supreme Court because of its contention that the part of the Employers' Liability Act abolishing the defense of assumed risk is unconstitutional. The Supreme Court [271 Ill. 544] transferred the case to this court, therefore it must be assumed no constitutional question is involved, and we must disregard that part of the brief and argument first filed in the Supreme Court and now filed here that is devoted to that question. Appellant, however, says that at common law there are two classes of risks which are assumed by the servant: First, those risks which are not created by the master's negligence, being the ordinary risks of the service; and, second, those risks which are created by the master's negligence, or extraordinary risks, the assumption of which is dependent wholly or in part on the servant's knowledge of the existence of the danger. That to say the servant does not assume the former class of risks—the usual and ordinary hazards of the business—is to say that the master is an insurer, that there can be no recovery against the master unless he is guilty of some breach of duty owing by

him to the servant; that the ordinary risks are assumed by the servant, which means that the master is not an insurer against injuries resulting from dangers which cannot be removed by the exercise of due care upon his part. While the statute in question creates a liability on the part of the master regardless of his negligence or want of negligence, if he elects to come under its terms, we have no doubt that in cases like the present one, where the master rejects the provisions of the act, his negligence must be averred and proven to warrant a recovery. The provisions of the act above quoted simply exclude certain defenses, among them assumed risk. In considering the defense of assumed risk in common-law actions, the courts have often distinguished between ordinary and extraordinary risks, and have discussed extraordinary risks as those created by the negligence of the master, and used the terms non-negligent and negligent risks, also sometimes classifying risks as "known" and "unknown." An exhaustive discussion and citation of authorities on this subject is found in a note in 28 L. R. A. (N. S.) page 1218. But the question in the present case is whether the Legislature intended to exclude the entire defense of assumed risk regardless of classifications and subdivisions of the subject. We are of the opinion that it did, and that in so doing it did not make the master an insurer because it is still necessary to show him negligent. In the cases of *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244 [1 N. C. C. A. 828]; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454 [5 N. C. C. A. 401]; *Crooks v. Tazewell Coal Co.*, 263 Ill. 343 [5 N. C. C. A. 410]; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480 [5 N. C. C. A. 419]; and *Bell v. Toluca Coal Co.*, 272 Ill. 576, the Supreme Court considered questions arising in denying masters the defense of assumed risk. In the first mentioned case there is an extensive discussion of the doctrine of assumed risk. We find nothing in those cases upon which to base a theory that

the Legislature only intended to exclude the defense in one class of assumed risks. To say that the servant assumes risks that do not arise from the master's negligence adds nothing in the present case to the statement that the master is not liable if not negligent. The jury were instructed that negligence on the part of the defendant must be proven as an affirmative fact by a preponderance of the evidence; that the defendant was not an insurer of the plaintiff against injury while in its employment and that they could not find a verdict against the defendant merely because the plaintiff was injured, that they could not find the defendant negligent merely because the spikes attached to the plaintiff's climber slipped out of the pole; that if they believed from the evidence that the injury to the plaintiff was the result of an accident and that the defendant was not the cause thereof, they should find the defendant not guilty; that if they found the injury was caused by plaintiff's negligence and not by the negligence of the defendant, they should find the defendant not guilty; that if they believed the accident occurred because of hidden defects in the pole not known to defendant and that could not be known to defendant by the exercise of ordinary diligence in time to avoid the injury, then they should find the defendant not guilty; that they could not find the defendant guilty even if they found the pole was defective in some respects unless they further found from the evidence that such defect was the proximate cause of the injury, and that the defendant knew of such defects, or by the exercise of ordinary care should have known of the same in time to avoid the injury; that if the injury was the direct and natural result of an accident and not the direct and natural result of the defendant's negligence, they must find for the defendant. The instructions left no ground for a verdict against the defendant if the evidence failed to show its negligence as the proximate cause of the injury. Nothing of legitimate benefit

to the defendant could have been obtained by trying to inform the jury of distinctions and differences in the rules of assumed risk. The risk was that the outside of the pole, because of its scarred and weakened condition, might splinter and give way under the pressure of the spur. There was no special inspection required. The defect was obvious and as well known to the plaintiff as to the defendant. If the defendant was under no duty to the plaintiff to remedy this defect it is not liable. If the defect should have been remedied by placing spikes in the pole on which to climb, or in some other practicable way, then the defendant was liable, notwithstanding the danger was obvious. And the plaintiff might have been held, in the absence of the statute, to have assumed the risk and notwithstanding he might by the exercise of greater care have safely ascended the pole. We may assume that appellant was not liable if the accident was occasioned by a knot in the pole that it in the exercise of ordinary care was not required to guard against. There was sufficient evidence that it was caused, as appellee suggests, by the splintering of the pole, to forbid a court's disturbing the verdict of a jury based on that finding of fact. It appeared that most of defendant's other poles in the vicinity had steps or spikes inserted upon which the workmen could climb. And while it also appears that the primary object of inserting such steps was not that of safety and very likely an unscarred pole could as safely be climbed without them, yet we think the jury were justified in finding that because of the weakened condition of the outside of the pole reasonable safety required the master to provide some such means of climbing.

Appellant asked the court to instruct the jury that it was not the duty of the defendant to place steps in its poles, which the court refused, and it is argued that this was error, and that the court also erred in permitting evidence to be introduced showing that the pole in

question was not stepped. It is a sufficient answer to these objections that evidence was necessarily heard on the condition of the pole as part of the *res gestæ*, and such evidence would necessarily disclose whether there were steps upon it, and that it was not for the court to determine, as matter of law, whether steps should have been placed upon the pole. It was for the jury to determine whether the pole was reasonably safe, and the court could not instruct them what construction was or was not sufficient for that purpose.

Appellant also contends that the court erred in refusing to admit evidence of the general custom among companies operating pole lines to make no independent inspection of its poles other than that made by the linemen themselves, and erred in refusing to instruct the jury that no duty of inspection rested on the defendant. This matter could only be important if some hidden defect of the pole had been in question. No such defect was under consideration. The jury were instructed that the defendant was not liable for hidden defects which it could not reasonably discover and repair. If it had been a question of hidden defect, we know of no authority permitting a court to say to a jury, as matter of law, what specific thing the defendant should have done or need not do to discover and repair it. Where all the facts of a situation have been ascertained and made intelligible to the jury, it is not a question for expert opinion whether the condition is safe or unsafe, nor should evidence be heard of what specific things other men do or are in the habit of doing under such circumstances. (*Bell v. Toluca Coal Co., supra,* and authorities there cited.) Appellant asked the court to instruct the jury that before they could find that the injury of the plaintiff was caused by a defect in the pole it was necessary not only that the circumstances should all concur to show that the injury was caused by such defect, but that they are inconsistent with any other rational conclusion. This

instruction was based on the theory that the evidence was entirely circumstantial, which was not the fact, therefore the court for that reason, if for no other, did not err in refusing that instruction.

Appellant in its brief states five points relied on for the reversal of the judgment. What we have said disposes of the questions presented in its statement of those points. There is a suggestion in the argument that the verdict is excessive. The injury was permanent, resulting in a thickening and stiffening of the ankle, and a shortening of the limb about an inch. We are of the opinion that the verdict was not excessive. Finding no substantial error in the record the judgment is affirmed.

Affirmed.

Penn Mutual Life Insurance Company, v. M. S. Forbes, Administrator, et al., Appellees. Arthur B. White, Appellant.

Gen. No. 6,177. (Not to be reported in full.)

Appeal from the Circuit Court of Carroll county; the Hon. OSCAR E. HEARD, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded with directions. Opinion filed August 10, 1916.

Statement of the Case.

Bill in equity filed by the Penn Mutual Life Insurance Company, complainant, against M. S. Forbes, administrator of the estate of Lizzie White, deceased, Arthur B. White and Lulu M. Wheeler, defendants, praying that the defendants be impleaded and their rights to the proceeds of a life insurance policy in the

hands of the complainant be determined. From a decree, the defendant Arthur B. White appeals.

Lizzie White, deceased, in her lifetime took out a life insurance policy in the sum of $2,000, in the Penn Mutual Life Insurance Company, which was payable to the executors, administrators or assigns of the insured. On the 16th day of October, 1894, this policy was assigned by her to her two children, Arthur B. White and Lulu M. White, who were minors at that time. The assignment was properly executed by the insured in the regular way, as required by the insurance company, and witnessed by an agent of the insurance company. A duplicate copy of the assignment was furnished by the insurance company and received by the company about November 1, 1894, and the company accepted the assignment as a transfer of the right to the benefits accruing under the policy. Whether the assignment was ever attached to the policy, which was retained by the insured, did not clearly appear.

The insured died on December 24, 1912. At the time of her death the insurance policy was still in her possession. Just prior to her death the insured made a last will in which she bequeathed the entire proceeds of the policy to her daughter, Lulu M. Wheeler, formerly Lulu M. White. The will was afterwards probated in the County Court of Carroll county, and the defendant M. S. Forbes was appointed administrator of the estate. The administrator claimed the proceeds of the policy and thereupon the insurance company filed a bill of interpleader in the Circuit Court of Carroll county, in which the company set forth the facts relative to the issuing of the policy to the insured and the subsequent assignment thereof to her children, and the fact that the proceeds of the policy were also claimed by the administrator of the estate of the insured. It also appeared from the bill that the net amount due under the policy was $1,760.32; that under the terms of the policy an unpaid premium note of

$262.48 was to be deducted from the gross amount due under the policy, and the complainant prayed to be allowed to pay the money into court so that the parties claiming the same could interplead.

Upon the hearing of the bill of interpleader the court entered a decree directing the insurance company to pay the $1,760.32 to the clerk of the court for the benefit of the party who might subsequently be decreed to be entitled thereto, and discharging the insurance company from all further liability in connection with the matter. The cause was thereupon referred to a special master in chancery to inquire into and report which of the defendants interpleading was entitled to the fund in controversy. The master, under the reference, heard all evidence offered by the respective parties to the suit.

Evidence was offered before the master not only concerning the matters pertaining to the assignment, the validity of which was in controversy, but there was also considerable evidence offered concerning the supposed disposition of some of the assets of the insured by her brother, Frank E. Adams, and concerning a supposed contract entered into by Adams with Lulu M. White, on the strength of which it was claimed by Adams that she requested him, as executor, named in the will of the insured, to pay her brother $1,000, and to reimburse himself from the proceeds of the policy, when he should collect the same; also evidence tending to prove that Lulu M. White afterwards, at the instance of her husband, repudiated this alleged agreement and that afterwards Adams was arrested in Clinton, Iowa, upon a charge of concealing the will of the insured, and that certain parties, including Lulu M. Wheeler and her husband and Arthur B. White, by means of this arrest and threatened prosecution, procured from Adams the payment of $1,000 to Arthur B. White, and also other money. Adams testified that before his arrest he had voluntarily paid to Lulu M.

Wheeler, by the directions he had received from his sister, the deceased insured, before her death, the sum of $500, and also $200 to Arthur B. White.

He further testified that there never were any assets of the estate of Lizzie White in his hands from which any payment could be made; that she had donated to him all the assets of her estate before her death, and that she left none except the insurance policy.

McMAHON & ROGERS, for appellant Arthur B. White.

F. J. STRANSKY, for Mark S. Forbes, Administrator.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 567*—*what not proper issues in action of interpleader.* In a suit in equity where an insurance company paid the amount due on a policy into court and impleaded as defendants the administrator of the deceased insured's estate and her two children, claiming the proceeds of such policy as assignees thereof, *held* that the issues whether certain moneys, claimed to have been paid by one not a party to the suit to the assignees on the alleged agreement that reimbursement should be had from the proceeds of such policy when collected, were in fact so paid, and whether they were paid from assets of the estate or from moneys belonging to such third party individually, were issues not properly within the suit since rights under such agreement, if existent, were personal ones between the assignees and the third party, and as to whether the money so paid belonged to the estate was a matter to be settled between the administrator and such third party in a proper proceeding in which he should be duly made a party.

2. INSURANCE—*when administrator may not question assignment of policy.* Though an insurance company requires that the assignment of a policy be attached to the policy, failure to comply therewith cannot be raised by the insured's administrator in an attack on the validity of such assignment, the estate having been the original beneficiary and the company having recognized the assignment.

3. INSURANCE, § 174*—*how delivery of assigned policy may be*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

made. Manual delivery of an assigned policy of insurance to the assignees is not necessary to validate the assignment, and such delivery may be by acts without words, or by words without acts, or by both.

4. COMPROMISE AND SETTLEMENT, § 16*—*when acceptance of settlement by minor presumed.* In the case of minors where a voluntary settlement is made for their benefit, an acceptance is presumed.

5. INSURANCE, § 175*—*when assignment of policy valid.* Where the insured executed in duplicate an assignment of a policy, payable to her estate, to her minor children, and sent a copy of such assignment to the insurance company, which was accepted by it, and retained the policy in her possession until her death, *held* such assignment was valid without a manual delivery of the policy.

6. INSURANCE, § 504*—*who may be made beneficiary upon change of.* An insurance policy payable to the insured's estate may, by him with the consent of the insurer, be made payable to any one not prohibited by law from becoming a beneficiary thereunder.

7. INSURANCE, § 504*—*when substituted beneficiary entitled to proceeds.* A delivery of a policy to one substituted, with consent of the insured, as beneficiary therein is not necessary to entitle such beneficiary to the proceeds thereof.

8. INSURANCE, § 504*—*what constitutes change of beneficiary.* A duly executed assignment of a policy of insurance, payable to the insured's executors, etc., is in effect but a change of beneficiary, and no delivery is necessary to make it valid.

9. INSURANCE, § 179*—*what is effect of will making different disposition of proceeds of assigned policy.* Where a policy of insurance payable to the insured's executors, etc., was duly assigned to the insured's minor children, though she retained possession thereof until her death, *held* that a different disposition of the proceeds thereof by will was ineffective.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Payton J. Tuohy, Appellant, v. Chicago & Joliet Electric Railway Company, Appellee.

Gen. No. 6,195. (Not to be reported in full.)

Appeal from the Circuit Court of Will county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Suit by Payton J. Tuohy, petitioner, against the Chicago & Joliet Electric Railway Company, respondent, to establish an attorney's lien. From an order dismissing the petition, the petitioner appeals.

The petition averred that James W. Miner, of the City of Joliet and county of Will, retained the petitioner to represent him, as personal representative of Harold Miner, deceased, in probating the estate of the deceased, and also in an action for personal injuries resulting in the death of said Harold Miner, such action to be brought against the Chicago & Joliet Electric Railway Company; that the petitioner on or about the 28th day of October, 1912, entered into a contract with said Miner, whereby he was to receive for his services rendered in that behalf a fee of one-third of the amount recovered against the Chicago & Joliet Electric Railway Company; that in compliance with the terms of the aforesaid agreement, he attended the inquest over the body of the aforesaid Harold Miner, deceased, and examined all the witnesses before the coroner; that on or about the 31st day of October, 1912, he served upon the Chicago & Joliet Electric Railway Company a notice of attorney's lien; that thereafter James W. Miner and the Chicago & Joliet Electric Railway Company compromised the said claim, with James W. Miner as administrator of the estate of Harold Miner, deceased, and that the sum

of $600 was paid to James W. Miner, as administrator, in full of all claims without the knowledge of the petitioner, and without any notice having been given petitioner.

The petition also averred that the notice required by the statute to be given was served and filed, in order to establish the lien, and was served and filed as required by law, but the evidence showed that the notice was served by mail.

PAYTON J. TUOHY, for appellant.

E. MEERS, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 138*—*when attorney not entitled to lien for services.* Where an attorney makes a contract with another, who subsequently is appointed administrator, to bring an action for damages for the death of the deceased, but such contract is not ratified by the administrator after his appointment, such attorney cannot, by serving notice on the one who caused the death, acquire a lien on such cause of action.

2. ATTORNEY AND CLIENT—*how notice to establish lien must be given.* A notice to establish an attorney's lien must be served personally and cannot be made by mail.

3. ATTORNEY AND CLIENT—*what is effect of admitting service of notice for lien.* In a suit to establish an attorney's lien, *held* that the respondent by admitting the service upon him of the notice set out in the attorney's petition did not admit that the service was made in the manner required by the statute.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Louis Schildmiller, Appellee, v. Cigarmakers' International Union of America et al., Appellants.

Gen. No. 6,198. (Not to be reported in full.)

Appeal from the County Court of Rock Island county; the Hon. NELS A. LARSON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action by Louis Schildmiller, plaintiff, against the Cigarmakers' International Union of America and Cigarmakers' International Union of America Local No. 201, defendants, to recover a death benefit. From a judgment for plaintiff, defendants appeal.

It appeared from the evidence that the father of the plaintiff, Henry Schildmiller, was at the time of his death in good standing as a member of the defendant Cigarmakers' International Union of America Local No. 201; that he had been such member for more than fifteen years prior to his death, which occurred on or about February 15, 1914; that under the constitution and by-laws of the organization named, it was provided that upon the death of such a member, a death benefit of $550 should be paid to any person designated in writing by such member; that if he failed to designate a person in writing, such death benefit should be paid to his widow; that if there was no widow, then to his minor children; that if there be no widow nor minor children, then to any relative of the deceased member who, at the time of his death, was dependent for support, in whole or in part, upon such deceased member.

It appeared that the deceased did not designate any one in writing as beneficiary; that he left no widow nor minor children, but did leave surviving him his son, the plaintiff, who claimed that he was partly dependent upon his father for support.

The evidence showed that the local organization was a part of the national organization, and under its control; that the local organization collected for and had the custody of the benefit fund out of which death benefits were payable; that the national organization controlled the fund, of which the local organization had the custody; that the local organization was prohibited by the by-laws of the organization from paying death benefits, except by the direction of the national organization.

The deceased member was a widower, and lived with the plaintiff, who was his only son; and while living with his son, and for at least two years prior to his death, he earned $30 per month for nine months of the year, which he paid over to his son, who used it for the support of himself, his family and household, of which the deceased was a member. The earnings of his father was the only money, outside of his wages, which plaintiff had or could depend on for the support of himself and family. The plaintiff was earning at the rate of $50 per month, and the amount required for such support varied from about $87 to $93 per month. The father while living with the plaintiff received as a part of this family expense from the plaintiff, not only food and clothing, but small incidentals, such as tobacco.

JOHNSTON & RAILSBACK, for appellants.

BEN A. STEWART, for appellee; WOLF & LOVE, of counsel.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 861*—*when action properly brought against local and national organizations of mutual benefit association.* Where a local organization of a benefit association was part of and under the control of the national organization, the former collecting dues and having custody of the benefit fund which the latter controlled and whose authority was necessary to permit the local organization to pay benefits, *held* that a suit for a death benefit was properly brought against both organizations.

2. INSURANCE, § 816—*when person in part dependent.* Where a member of a benefit association lived with his son, to whom he gave his wages, and the son, from such wages and those earned by himself, supported his family and his father, *held* that the son was partly dependent on the father for support, and entitled to recover a death benefit payable to one in whole or in part dependent on a member for support.

3. INSURANCE, § 897*—*when dependency question of fact.* Whether one is dependent for support on a member of a benefit association, within the meaning of the certificate, is a question of fact to be determined from the facts and circumstances of each particular case.

4. INSURANCE, § 816*—*when person entitled to recover as dependent.* In order to entitle one to recover on a death benefit certificate as a dependent of a deceased member of a benefit association, it is not essential that there should have been any legal duty of the deceased member to support such dependent.

5. INSURANCE, § 816*—*when person entitled to recover as dependent.* In order to entitle one to recover as a dependent, a death benefit of a deceased member of a benefit association, it is only necessary that such dependency exist to a substantial extent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

E. R. Downer, Plaintiff in Error, v. John J. Warren and Gertrude A. Warren, Defendants in Error.

Gen. No. 6,230.

1. EQUITY, § 30*—*when party estopped to claim lack of jurisdiction of equity.* One who has summoned another before a court of equity cannot object that as to relief, concerning matters in controversy, which such other seeks he has an adequate remedy at law.

2. EQUITY, § 38*—*when concurrent jurisdiction with courts of law.* A court of equity has concurrent jurisdiction with courts of law in questions involving fraud.

3. EQUITY, § 23*—*when jurisdiction retained.* When a court of equity obtains jurisdiction of a cause for one purpose it may retain it for all purposes, even though some of the matters involved are more cognizable in a court of law.

4. JUDGMENT, § 66*—*when procuring entry of judgment by confession fraudulent.* Procuring the entry of a judgment by confession under a power of attorney which the creditor knew had become inoperative because of the discharge of such indebtedness by the debtor's discharge in bankruptcy, *held* fraudulent.

5. JUDGMENT, § 321*—*when equity jurisdiction to inquire into question of fraud in entry of judgment.* On a creditor's bill to discover assets of the judgment debtor and cross-bill, averring that the judgment was fraudulently entered and praying an injunction restraining proceedings thereunder, the court may inquire into such question of fraud and, if proper, grant the prayer.

6. JUDGMENT, § 199*—*what is effect of invalidity of judgment as to one joint defendant on liability of other.* A creditor's bill for discovery of assets of joint judgment debtors must be dismissed on a finding that the judgment was fraudulently entered as to one defendant, since it must be treated as a unit and cannot be valid as to one defendant and invalid as to another.

7. APPEAL AND ERROR, § 553*—*when cross-bill sufficient on appeal.* Where, on filing of a joint answer and cross-bill, the complainant moved to strike the cross-bill from the files on the ground that it was filed before the answer, but filed no exceptions to the pleading as an answer, and an amended cross-bill was filed to which the complainant demurred, but did not move to strike from the files for lack of an answer, *held* that such cross-bill must be sustained on appeal.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Error to the Circuit Court of Kane county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

CHARLES H. DARLING, for plaintiff in error.

No appearance for defendants in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

In this case a creditor's bill was filed on March 25, 1912, in the Circuit Court of Kane county, by the plaintiff in error, E. R. Downer, against the defendants in error, John J. Warren and Gertrude A. Warren. The bill was founded upon a judgment, which had been taken by confession, against the defendants in error, on the 9th day of November, 1911, for the sum of $522. The note and power of attorney upon which the judgment was based was dated August 27, 1903, the note being for the sum of $350, payable in six months after date, with six per cent. interest per annum from date.

The bill alleges that an execution had been issued on the judgment February 7, 1912, and returned *nulla bona,* and seeks discovery of assets and legal and equitable interests in property, claimed to be held by the defendants in error for the purpose of utilizing the same in the liquidation of the judgment. To this bill of complaint the defendants in error filed a joint and several answer and cross-bill combined. The plaintiff in error moved to strike the cross-bill from the files for the reason that the cross-bill was filed before the defendants in error had filed their answer to the bill of complaint, which motion the court denied. Afterwards, on July 15, 1913, however, the court granted defendants in error leave to file an amended cross-bill instanter, and to this amended cross-bill plaintiff in error interposed a demurrer, which the court overruled, and thereupon entered a rule upon plaintiff in

error to answer the cross-bill, but the plaintiff in error elected to abide by his demurrer and the court then entered a decree taking the cross-bill as confessed, defaulting the plaintiff in error for want of an answer thereto, and finding the facts as alleged in the cross-bill, and upon the basis of these facts finding the equities to be with the defendants in error.

The facts found by the court, which are alleged in the cross-bill, are that on the 27th day of August, 1903, the defendants in error, John J. Warren and Gertrude A. Warren, executed the promissory note for $350, upon which the judgment was founded, and the power of attorney, which note and power of attorney were signed by Gertrude A. Warren in the name and style of "Mrs. John Warren," and that on the 28th day of March, 1906, the defendant in error, John J. Warren, filed in the District Court of the United States for the Northern District of Illinois, the Eastern Division thereof, his petition in bankruptcy, and on the 4th day of February, 1907, an order was entered by said court discharging said John J. Warren from all debts and claims made provable under the bankruptcy laws of the United States, and which existed on the 28th day of March, 1906.

The court finds that the order of discharge operated as a discharge of the debt represented by the promissory note in question and of the obligation thereof; that at the time of the entry of the judgment in question for the sum of $522 in favor of the plaintiff in error, the said John J. Warren therefore was not indebted to the said E. R. Downer upon the promissory note, nor upon the obligation for which it was given, and that the power of attorney attached to the note had become null and void by reason of the discharge in bankruptcy, and did not any longer authorize any attorney to appear and confess judgment against the defendants in error; and the court finds that the judgment in question against the said defendants in

error was obtained and entered of record on the 9th day of November, 1911, is null and void and of no force and effect; and ordered that the plaintiff in error, E. R. Downer, and his attorney, be permanently enjoined and restrained from selling, assigning, or otherwise disposing of any claimed interest in said judgment of record, and from causing any execution to issue thereon; and further decreed that said judgment be set aside.

From this decree the plaintiff in error prosecutes this writ of error, and it is contended by him that the court erred in overruling the demurrer to the amended cross-bill, and he insists that the defendants in error, on account of the matters set forth in the amended cross-bill, should have sought their remedy at law; and that they have no standing in a court of equity to set aside and vacate a judgment at law, but should have gone into the court where the judgment was rendered and made a motion and an affidavit setting up the facts averred in the cross-bill, and asked leave to plead and prove their defense to the judgment; that the defendants in error have no right to seek the aid of a court of equity, where their remedy at law is complete and adequate.

We are of opinion, however, that the plaintiff in error cannot successfully raise the question that defendants in error are in the wrong tribunal to have their rights adjusted, when he himself summoned them into this tribunal. He is not in position to deny them the privilege of having their rights and interests, which are involved in the subject-matter of this suit, settled by the court to which he compelled them to come and submit themselves. However, a court of equity has concurrent jurisdiction with courts of law, in questions involving fraud. (*Newman v. Willitts*, 60 Ill. 519; *Jones v. Neely*, 72 Ill. 449; *Babcock v. McCamant*, 53 Ill. 214; *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428.) And when a court of equity obtains jurisdic-

tion of a cause for one purpose it retains it for all purposes, even though some of the matters involved are more cognizable in a court of law. (Pomeroy's Equity, vol. 1, sec. 181; *Stickney v. Goudy,* 132 Ill. 213; *Grand Tower & C. G. R. Co. v. Walton, supra; Coleman v. Connolly,* 242 Ill. 574; *Drum v. Drum,* 251 Ill. 232; *Patterson v. Patterson,* 251 Ill. 153.)

John J. Warren's discharge in bankruptcy released him from all debts provable against his estate as a bankrupt, and this included the promissory note in question. (*Nelson v. Petterson,* 229 Ill. 241.) From the allegation of facts in the cross-bill it clearly appears that the note in question was a subsisting debt against John J. Warren on March 28, 1906, and was provable against his estate as a bankrupt; and was in fact proved up against his estate by the plaintiff in error prior to the date of his discharge in bankruptcy, namely, February 4, 1907. The plaintiff in error must, therefore, be charged with full knowledge of the fact that at the time the judgment by confession was entered upon the note under the stipulations of the power of attorney attached thereto, the note was no longer a subsisting debt against the defendant in error, John J. Warren, and that the power of attorney had become inoperative. Under these circumstances the act of the plaintiff in error in invoking the power and jurisdiction of the court to enter a judgment upon an indebtedness which he knew had been released by the bankrupt's discharge under a power of attorney which he knew had become inoperative was a fraud, and the judgment was therefore fraudulently entered against the defendant in error, John J. Warren, and the transaction, therefore, became a legitimate matter for the jurisdiction of a court of equity.

It is insisted, however, that because the discharge in bankruptcy affected only the rights of the defendant in error, John J. Warren, the other defendant in error, Gertrude A. Warren, could not base any defense to the

man as indicated an indifference to consequences, wantonness, and wilfulness.

5. NEGLIGENCE, § 7*—*what constitutes wilful or wanton negligence.* It is not necessary, in order to constitute wilful or wanton negligence, to show ill-will against the particular person injured, but an entire absence of care for the life, person or property of others, if it exhibits indifference to disastrous consequences, is sufficient.

6. NEGLIGENCE, § 192*—*when question for jury.* Whether a personal injury has been inflicted by gross and wanton negligence is a question of fact to be determined by the jury.

7. NEGLIGENCE, § 91*—*when contributory negligence immaterial.* Where, in an action for personal injuries, wantonness and wilfulness on the part of the defendant's servants are shown, the question of contributory negligence of the plaintiff is immaterial.

Error to the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

BULL & JOHNSON and CHARLES H. KING, for plaintiffs in error.

COOKE, POPE & POPE and PAUL MACGUFFIN, for defendant in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This action was commenced in the Circuit Court of Lake county by the defendant in error, Paul Lund, against the receivers of the Milwaukee Electric Railroad Company, plaintiffs in error, to recover damages for personal injuries suffered by him; and this is the second time the case has been brought before this court for review. At the former hearing, the judgment rendered was reversed and the cause remanded for another trial. (*Lund v. Osborne,* 183 Ill. App. 63.) Upon a retrial of the case in the court below, the jury awarded the defendant in error damages in the sum of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

$5,000, and the court rendered judgment on the verdict of the jury.

The facts appearing in the record concerning the injury and the condition of the pleadings are stated in the previous opinion, and are as follows: The Chicago & Milwaukee Electric Road runs between Chicago and Milwaukee in a northerly and southerly direction upon St. Johns avenue and crosses Central avenue, an east and west street of the City of Highland Park. The tracks of the Chicago & Northwestern Railway are a short distance west and the passenger station of said railway is a short distance south of Central avenue and a short distance west of St. Johns avenue.

At the time in question, a car of the electric railway was running south on St. Johns avenue and a passenger train, southbound on the Chicago & Northwestern Railway, was approaching the passenger station. The tower bell of the steam railway was ringing and its gates over Central avenue were being lowered. Paul Lund was on the east side of St. Johns avenue and desired to take passage on the Northwestern train. He was going across St. Johns avenue, within the limits of Central avenue, and was either walking fast or running to reach the Northwestern train, when he and said electric car collided on the eastern part of the rounded surface of the front of said car and he was thrown away from the car onto the pavement and very seriously injured.

The declaration consists of two counts and of an additional or third count. The first count charges that the plaintiff was exercising due care and that the defendants carelessly drove the car at a dangerous rate of speed in crossing Central avenue, and struck and injured the plaintiff. The second count contains no allegation that the plaintiff exercised due care, but charges that the plaintiff was necessarily crossing Central avenue to reach the Northwestern station, in and

about his business; and that the defendants were driving the car at a high rate of speed, and knew that the plaintiff was about to cross their tracks, and did not use ordinary care to avoid injuring him, nor give him any warning, but that they negligently and wilfully ran the car against him, and thereby injured him; and that there was then in force in said city an ordinance which required defendants to maintain a flagman where it crossed any street in said city, whose duty it should be to signal persons traveling in the direction of such crossing and warn them of impending danger, and that the defendants did not have a flagman at the crossing of Central avenue and plaintiff was not warned of the impending danger.

The third count does not allege that the plaintiff was exercising due care, but charges the defendants, as in the second count, with a lack of ordinary care and with a failure to give the plaintiff any warning, and that they negligently, wilfully and wantonly ran their car against the plaintiff and injured him. A number of questions are raised by plaintiffs in error, some of which were passed on in the former opinion, and those previously determined we shall not again consider at this time.

The plaintiffs in error, at the conclusion of the evidence introduced in behalf of the defendant in error, moved the court that the defendant in error be put upon his election as to the second and additional counts of his declaration, as to whether the defendant in error would rely upon the charge of simple negligence in the counts or upon the charge of wilfulness and wantonness, and the motion was denied. The plaintiffs in error then also offered separate motions, at the close of the evidence adduced for the defendant in error, to instruct the jury to find the plaintiffs in error not guilty as to each of said counts, which motions were also denied by the court.

We are of opinion that no error was committed in denying these motions, and the defendant in error could not be put upon an election with reference to the matters alleged but had a right to submit the questions pertaining to the extent of the negligence, which was charged in the counts, to the jury; and the plaintiffs in error were not entitled to a separate verdict on the different counts of the declaration until the whole case was submitted for the consideration of the jury. (*Scott v. Parlin & Orendorff Co.*, 245 Ill. 460; *Colesar v. Star Coal Co.*, 255 Ill. 532; *Chicago, R. I. & P. Ry. Co. v. Clough*, 134 Ill. 586.)

Plaintiffs in error strenuously insist that the important question in this case, under the pleadings and the evidence, is whether or not the defendant in error was guilty of contributory negligence, and that the evidence so conclusively shows that he was guilty of contributory negligence as to bar a recovery, as a matter of law. We cannot agree with them in this contention, furthermore, it may be proper to add that the importance of the factor of contributory negligence depends upon the state of the proof concerning the charge made in the declaration, that the defendant in error was injured by acts which were wilful and wanton. The evidence shows that the intersection of St. Johns avenue with Central avenue is apparently the most frequented and busiest place in Highland Park, and necessarily and most frequently used by foot passengers and vehicles in connection with the Chicago & Northwestern passenger station; and, that about the time of the injury to the defendant in error, there were probably thirty people hurrying along and across this intersection, for the purpose alone of taking passage on the Chicago & Northwestern train, which was about to leave, and there were other people moving in and about this intersection for other purposes.

It is clearly the duty of those in control of street cars to exercise a greater degree of care and watchful-

ness when approaching a street crossing or intersection than at other places along their route. (*Heidenreich v. Bremner*, 260 Ill. 439, and cases there cited.) This duty is particularly emphasized when the crossing or intersection is a busy one and much frequented. (*Chicago City Ry. Co. v. Tuohy*, 196 Ill. 410; *Chicago City Ry. Co. v. Fennimore*, 199 Ill. 9.)

The evidence tends to prove that the electric car which was managed by the motorman of the plaintiffs in error ran into this much frequented and busy intersection, at probably its busiest time, at a dangerously high rate of speed (two witnesses testified that the speed at which the car was running exceeded twenty miles an hour), and that the motorman who was managing the car, and who was supposed to be on the lookout, and was charged with a high degree of watchfulness at this point, had not even noticed the defendant in error on the street in front of him, as he was attempting to cross, when the car struck him; and the first knowledge the motorman had of the injury to the defendant in error was when passengers standing near him on the platform called his attention to the unfortunate fact. Undoubtedly the jury could reasonably infer from this evidence, not only that the car was running at a rate of speed highly dangerous, but that there was such a lack of watchfulness on the part of the motorman as indicated an indifference to the consequences which naturally might be involved, which affected the life, limb and property of persons, under the circumstances and conditions which prevailed at this intersection.

It is not necessary, in order to constitute wilful or wanton negligence, to show ill-will against the particular person injured, but an entire absence of care for the life, person or property of others, if it exhibits indifference to disastrous consequences, is sufficient. (1 Thompson on Negligence, sec. 22; *Neice v. Chicago & A. R. Co.*, 254 Ill. 595; *Chicago Terminal Transfer R.*

Co. v. Kotoski, 199 Ill. 383; *Illinois Cent. R. Co. v. Leiner,* 202 Ill. 624.) And whether a personal injury has been inflicted by gross and wanton negligence is a question of fact to be determined by the jury. (*Heidenreich v. Bremner, supra; Illinois Cent. R. Co. v. Leiner, supra; Chicago, B. & Q. R. Co. v. Murowski,* 179 Ill. 77.)

We are of opinion that there is sufficient evidence in the record, from which the jury might reasonably infer, and from which they would be justified in finding, that the injuries to the defendant in error were caused by negligence that was wilful and wanton, as charged in the declaration. It is not necessary, therefore, in this state of the proof, to discuss the matter of contributory negligence.

We are of opinion that no error was committed in the instructions given, nor in the modifications made, concerning the question of wilful and wanton negligence, which was involved in the case. The instructions, with the modifications, state the law with substantial accuracy. Nor was there any reversible error committed in giving the instructions concerning the elements to be taken into consideration by the jury, in arriving at the amount of damages. The judgment should therefore, be affirmed.

Judgment affirmed.

Davis Milk Machinery Company, Defendant in Error, v. A. D. Tappen, Plaintiff in Error.

Gen. No. 6,245. (Not to be reported in full.)

Error to the Circuit Court of Grundy county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action in replevin by Davis Milk Machinery Company, plaintiff, against A. D. Tappen and W. L. Avery, defendants, to recover possession of certain personal property. From a judgment finding the ownership and possession of the property to be in plaintiff, defendant A. D. Tappen prosecutes a writ of error, the case having been dismissed as to the other defendant before trial.

FRANK H. HAYES, for plaintiff in error.

CORNELIUS REARDON, for defendant in error.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1303*—*when presumed that verdict sustained by evidence.* In the absence of a bill of exceptions setting out the evidence, it must be conclusively presumed that a verdict is sustained by the evidence.

2. PLEADING, § 466*—*when absence of formal plea cured by verdict.* If parties allow a suit to go to trial without the filing of a plea, or without formal issue or without formal pleadings, the error is cured by verdict.

3. PLEADING, § 466*—*when failure to file plea cured by appearance.* Defects in pleadings arising from the failure to file a formal plea are cured by the appearance of the parties.

4. APPEAL AND ERROR—*when improper joinder of causes harmless error.* The improper joinder of a count in assumpsit to a declaration in replevin is harmless error where no objection to such procedure was raised in the court below.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harry Allison, Appellee, v. Belvidere Screw & Machine Company, Appellant.

Gen. No. 6,247. (Not to be reported in full.)

Appeal from the Circuit Court of Boone county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action by Harry Allison, plaintiff, against Belvidere Screw & Machine Company, defendant, to recover a balance of $68.60 claimed to be due for services. From a judgment for plaintiff for $50, defendant appeals.

It was conceded in the court below that the plaintiff had worked for defendant 196 hours, for which he had not been paid, and that the wages he received for such work was at the rate of thirty-five cents per hour, which would amount to the sum of $68.60; but defendant claimed that the plaintiff, in his employment as a screw machine operator, in turning out some bushings, which the defendant had a contract to manufacture and deliver to the Fox Machine Company, had done some of his work defectively, which resulted in damages to the defendant to the amount of $37.45, and sought to recoup these damages against the amount admitted to be due plaintiff.

W. C. DEWOLF, for appellant.

ALEXANDER J. STROM, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. SET-OFF AND RECOUPMENT, § 41*—*when evidence sufficient to sustain verdict.* In an action by an employee to recover for wages as a screw machine operator, when the amount of work done was undisputed, but defendant endeavored to recoup damages for defective work which had been returned by a purchaser and credit given the latter for a certain sum, where there was evidence that the cost of the materials and labor amounted to the sum claimed by defendant, that the returned articles were worthless for sale, but no proof that the articles might or might not be of any value for any other purpose, evidence *held* sufficient to sustain a verdict in which defendant was allowed about one-half of his claim.

2. APPEAL AND ERROR, § 1523*—*when error in instruction harmless.* Any error in a given instruction is harmless where it is not misleading and it cannot have any effect on the verdict.

Benjamin Lounsberry, Appellant, v. George Boger, Executor, Appellee.

Gen. No. 6,249. (Not to be reported in full.)

Appeal from the Circuit Court of DuPage county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action of replevin by Benjamin Lounsberry, plaintiff, against George Boger, as executor of the estate of Albert Smart, deceased, defendant, to recover possession of a promissory note which plaintiff claimed was donated to him by decedent prior to his death and wrongfully withheld from him by defendant, as executor. From a judgment for defendant, plaintiff appeals.

The legal questions involved are practically the same as were passed on in *Lounsberry v. Boger*, 193 Ill. App. 384, a related case.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

BUNGE & HARBOUR, for appellant.

S. L. RATHJE and T. H. SLUSSER, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. GIFTS, § 30*—*what constitutes valid gift causa mortis.* To make a valid gift *causa mortis*, the owner must not only part with the possession but all control and dominion of the property.

2. GIFTS, § 34*—*what does not constitute gift causa mortis.* There is no parting with the control or dominion of a note by a decedent during his lifetime so as to constitute a valid gift *causa mortis* where a donor of a note—which contained an indorsement signed by the donor that if the note was not paid before his death, it should be paid to the donee, and which was included with other papers in a tin box, to which the donor had the key—called the donee into his room and expressed his intention of giving him the note after his death and instructed another person to give it to him after the funeral, and gave such other person the keys, and possession of the entire contents of the box was obtained by the executor of deceased after his death.

General Accident Fire & Life Assurance Corporation, Ltd., Appellant, v. Sophia Krekel, Appellee.

Gen. No. 6,252. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CHESTER BARNETT, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action by Sophia Krekel, plaintiff, against General Accident Fire & Life Assurance Corporation, Ltd., de-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

fendant, to recover on an accident insurance policy for $300 on the life of plaintiff's husband. From a judgment for plaintiff for $345, defendant appeals.

KEITHLEY & KEITHLEY, for appellant.

KIRK & SHURTLEFF, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 864*—*when questions not considered on appeal.* Questions pertaining to the issue raised by the general issue and to the verdict will not be considered on appeal where the abstract does not contain the declaration or verdict.

2. INSURANCE, § 667*—*when evidence insufficient to show that insured committed suicide.* In an action on a life insurance policy where there was no direct evidence as to how the insured was shot, but it appeared that on the morning of his death he dressed himself, took his revolver, and went downstairs to his saloon and then into the basement and returned to the saloon, where, after a scuffling sound and two revolver shots, he was found dead, and a door leading to the outside of the building open with a bullet hole through it, evidence *held* insufficient to show that deceased committed suicide.

3. APPEAL AND ERROR, § 1236*—*when party may not complain of insufficiency of proof.* An insurance company which waives formal proof of notice of death of the insured and of proofs of death at the trial cannot complain on appeal of the insufficiency of the proof in such respects.

4. INSURANCE—*when no recovery on accident policy for additional per cent.* Where an accident insurance policy provides that the beneficiary, in case of death of insured, shall be entitled to recover a certain sum, and, in addition thereto a stipulated per cent. for each consecutive month preceding the accident, provided the policy is maintained in force continuously, and the monthly premiums are paid on the date due, there can be no recovery for such stipulated per cent. if the payments are not made when due.

5. APPEAL AND ERROR, § 1769*—*when affirmed upon entering of remittitur.* A judgment will be affirmed where the amount thereof is erroneous, upon entering of a remittitur as required by the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois ex rel. Iceleen Wilson, Appellee, v. Fred Cutler, Appellant.

Gen. No. 6,254. (Not to be reported in full.)

Appeal from the County Court of Knox county; the Hon. R. C. RICE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

Statement of the Case.

Bastardy proceedings by the People of the States of Illinois, on the relation of Iceleen Wilson, plaintiff, against Fred Cutler, defendant. From a judgment of conviction, defendant appeals.

R. D. ROBINSON, for appellant.

A. J. BOUTELLE, for appellee; JOSIAH BABCOCK and M. J. DAUGHERTY, of counsel.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. BASTARDS, § 22*—*what degree of proof required to establish charge.* It is incumbent on the prosecution to establish the charge of bastardy by the weight of evidence.

2. BASTARDS, § 22*—*when verdict against weight of evidence.* In bastardy proceedings where the only testimony on behalf of the plaintiff was the bare assertions of the prosecuting witness that defendant had intercourse with her and was the father of the child, which was flatly denied by the defendant, and there was the testimony of other unimpeached witnesses on behalf of defendant, strongly militating against the charge of paternity, *held* that a verdict finding defendent to be the father of the child was against the weight of evidence.

3. BASTARDS, § 62*—*when verdict set aside.* A verdict in bastardy proceedings which is against the weight of evidence should be set aside.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Michael J. Ryan, Appellee, v. John E. Harty, Appellant.

Gen. No. 6,256. (Not to be reported in full.)

Appeal from the Circuit Court of Stark county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action of assumpsit by Michael J. Ryan, plaintiff, against John E. Harty, defendant, to recover the amount of a note for $1,106 alleged to have been retained by defendant. From a judgment for plaintiff for $1,000, defendant appeals.

JOHN W. FLING, JR., and WILLIAM W. WRIGHT, for appellant.

JAMES H. RENNICK, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 475*—*what constitutes preponderance.* The number of witnesses testifying in a case is not necessarily decisive of the question of preponderance.

2. EVIDENCE, § 475*—*what constitutes preponderance.* If there are but two witnesses in a case and they testify diametrically opposite to each other concerning matters within their personal knowledge, this does not necessarily result in a lack of preponderance, but the question of preponderance is largely a question of credibility of the witnesses, and is for the jury to determine.

3. WITNESSES, § 253*—*who proper judge of credibility of.* The jury are the proper judges of the credibility of witnesses.

4. APPEAL AND ERROR, § 1258*—*when defendant may not complain of verdict.* A defendant cannot complain on appeal that a verdict is for a lesser sum than the amount of the plaintiff's claim.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Robbs Express Company, Appellee, v. Nickolas Ferkel, Appellant.

Gen. No. 6,277. (Not to be reported in full.)

Appeal from the County Court of Rock Island county; the Hon. NELS A. LARSON, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action in assumpsit by Robbs Express Company, plaintiff, against Nickolas Ferkel, defendant. From a judgment for plaintiff, defendant appeals.

The action was brought to recover certain collections alleged to have been made by the defendant for work done under the following contract:

"July 1, 1910.

"AGREEMENT entered into this day between Robbs Express Company and Nick Ferkel, whereby the Robbs Express Company have agreed to employ Nick Ferkel as teamster on the basis of Twenty-one Dollars per week, he to furnish his own team and harness and it is understood he is to do what hauling we have to and from the Rock Island Arsenal exclusively. Where it is impossible to do the work with one team we will furnish the help on days when shipments are too heavy. This contract to go into effect July 1, 1910, and run until July 1, 1911.

"Signed Robbs' Express Co.
Per F. W. DaFoe, Sec'y.

"Accepted
Nick Ferkel."

The defendant contended that this written contract related only to the hauling which the plaintiff had contracted to do for the Government, of Government owned materials and supplies, and testified that on the day on which this written agreement was entered into, and before its final execution, he made a verbal addi-

tional and distinct agreement with E. F. Lewis, the president of the express company, concerning other than Government owned stuff to be hauled to and from the arsenal by him, for the express company, by which the parties were to share equally in the profits of such work, and that in his judgment the written contract was signed after the verbal understanding mentioned.

The defendant pleaded the general issue and filed a notice of set-off, claiming one-half of the collections made by the plaintiff for work claimed to have been done under the alleged verbal agreement.

JOSEPH L. HAAS and HARRY MCCASKRIN, for appellant.

WILLIAM MCENIRY, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 322*—*when parol evidence inadmissible.* A written contract unambiguous in its terms cannot be varied, contradicted or modified by parol evidence of anything that occurred at or prior to the time when such contract was executed.

2. CONTRACTS, § 256*—*when oral agreement merged in written contract.* In an action to recover collections made by the defendant for hauling done by him under a written contract with the plaintiff, such contract by its terms covering all hauling to and from a certain place, *held* that an oral agreement, alleged by the defendant to have been entered into by the parties prior to the execution of the written contract, whereby it was claimed to have been agreed that the material to be hauled from such place under the written contract should include only that owned by a certain party, was, if made, merged in the written contract, and collections made by the plaintiff for hauling claimed to have been done thereunder could not be set off in such action.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Laura Baker, Appellee, v. State's Accident Insurance Company and American Bankers' Insurance Company, Appellants.

Gen. No. 6,279.

INSURANCE—*when insured confined in house within health insurance policy.* An insured, under a health and accident insurance policy providing for payments during such time as the insured might be necessarily confined in the house, by reason of disease or illness which would wholly deprive her from pursuing her occupation, *held* entitled to recover though she went to and from her house to the office of her physician to receive treatment.

Appeal from the County Court of Peoria county; the Hon. CHESTER M. BARNETT, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

GEORGE J. JOCHEM, for appellants.

KIRK & SHURTLEFF, for appellee.

MR. PRESIDING JUSTICE NIEHAUS delivered the opinion of the court.

This is an action in assumpsit commenced by the appellee, Laura Baker, in the County Court of Peoria county against the appellants, the State's Accident Insurance Company and the American Bankers' Insurance Company. The suit is based upon a benefit claimed by the appellee under the terms of a certain health and accident insurance policy issued to her by the State's Accident Insurance Company, which was subsequently absorbed and taken over by the American Bankers' Insurance Company.

The appellee claims an insurance in the sum of $15 per week for the first two weeks, and $25 per week for the next fifty weeks, during such period of time, if any, in which the insured might be necessarily confined in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the house by reason of disease or illness, which, independently of all other causes, would wholly disable and prevent her from performing any and every duty pertaining to her occupation as a seamstress. In her amended declaration she avers that on July 1, 1915, in the City of Peoria, where she resided and pursued the occupation of seamstress, in some manner unknown to herself, she became afflicted with sore eyes, so much so that she immediately thereupon consulted an eye specialist for necessary treatment, and that from and after such 1st day of July, 1915, the appellee became and remained so severely afflicted and diseased by reason of such disability or illness that independently of all other causes she was thereby wholly disabled and prevented from performing any and every duty pertaining to her said occupation, namely, seamstress, and that she continuously so remained wholly disabled and prevented from performing any and every duty pertaining to her said occupation as seamstress on and from said 1st day of July, 1915, and to and including the 16th day of August, 1915, and that she was during all of the aforesaid period necessarily confined in the house, except that she was able to go and come to and from her home to the office of said eye specialist for treatment. But that she was not during all of the aforesaid period able to perform any duty whatever pertaining to her said occupation as a seamstress, and that she did not perform any of such duties pertaining thereto or any other duty whatsoever during said period of time.

The appellants filed a general demurrer to the declaration containing the averments above set forth and the court overruled the demurrer. Appellants elected to abide by the demurrer, whereupon the court rendered judgment against them for $147.85, and costs of suit, and the appellants prosecute this appeal to reverse the judgment.

It is contended by the appellants that under the aver-

ments in the declaration the appellee had no right to recover because it appeared from them that she was not necessarily confined in the house by the disease of her eyes, but was able to go, and did go, from her home to the office of her physician who was treating her for the disease with which she was afflicted, and it is insisted that under the terms of the policy under which appellee is seeking to recover it must not only appear that appellee was afflicted with a disease or illness which prevented her from performing any and every duty pertaining to her occupation, but that by reason of such illness or disease she was necessarily and constantly confined in the house.

The terms "necessarily confined in the house," however, have been repeatedly interpreted by courts of review in different States, and it has been repeatedly held that the words quoted in an insurance policy of this kind should not be interpreted to mean that the person must remain constantly in the house; that the words should receive a reasonable construction with a view to the purpose for which they were intended in the insurance agreement. Thus it was held in *Breil v. Claus Groth Plattdutschen Vereen,* 84 Neb. 155, that within the meaning of an insurance contract for sick benefits it cannot be said that an assured is not confined constantly in the house during an illness characterized by recurring periods of severity, although at intervals he may occasionally step into his yard or make visits to his physician, or other short and unusual trips, the assured at all times being unable to resume the ordinary duties and pleasures of life. And in *Hoffman v. Michigan Home & Hospital Ass'n,* 128 Mich. 323, it was held that the benefit provided by a similar contract is not defeated by the fact that the insured went out by the direction of his physician for an occasional airing, and it was held in *Mutual Benefit Ass'n v. Nancarrow,* 18 Colo. App. 274, that the words "confined in the house" contained in the benefit certificate

do not contemplate a constant restraint indoors, and the fact that the insured visited his physician's office, using a car line, would not defeat his right of recovery. To the same effect are *Thayer v. Standard Life & Accident Ins. Co.*, 68 N. H. 577; *Jennings v. Brotherhood Accident Co.*, 44 Colo. 68; *Scales v. Masonic Protective Ass'n*, 70 N. H. 490, and *Metropolitan Plate Glass & Casualty Co. v. Hawes' Ex'x*, 150 Ky. 52. While there are a few cases which apparently hold a contrary doctrine, some of which are cited by appellants, the great weight of authority sustains the view that the fact that appellee went to and from the office of her physician for treatment during her confinement in the house by her illness would not defeat her recovery under the terms of the policy.

We are of opinion, therefore, that the declaration stated a cause of action and that the court properly overruled appellant's demurrer and rendered judgment. The judgment should be affirmed.

Judgment affirmed.

William C. Siegert, Appellee, v. Public Service Company of Northern Illinois and City of Ottawa, Appellants.

Gen. No. 6,148. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the October term, 1915. Reversed and remanded. Opinion filed August 10, 1916.

Statement of the Case.

Action by William C. Siegert, plaintiff, against Public Service Company of Northern Illinois, a corpora-

tion, and the City of Ottawa, defendants, to recover for personal injuries. From a judgment for plaintiff, defendants appeal.

The Illinois River bridge is 942 feet long, with a driveway 24 feet wide, and was on July 8, 1914, the day in question, the only means of crossing the Illinois River in the City of Ottawa. There was a large amount of travel across the bridge, including interurban and street car traffic. There was laid along the east side of the wagon road of the bridge extending into the driveway, about 18 inches from the side of the bridge, an 8 inch gas pipe used by defendant Public Service Company, laid in sections joined by a flange or expansion joint projecting 2 inches, so that the diameter of the pipe and flange was about 12 inches. This pipe was elevated a few inches above the level of the floor of the bridge on a cement foundation, but extended beyond the base on which it rested. It was not covered or guarded in any way, and the flange or expansion joint was so constructed that a wheel scraping along the side of the pipe would catch on the flanges. Plaintiff was a gardener, acquainted with and accustomed to the use of this bridge. He drove onto it with a horse that was somewhat afraid of cars and met a street car. His horse shied to the east as the car passed him, and just then another car came up. The horse, becoming more frightened, veered to the east and started to run. The left wheel of the wagon struck against the gas pipe a few feet from a flange. The wheel slid along until it hit the projection of the flange. The wagon was thrown into the air by the force of the impact, and plaintiff thrown out and injured.

The court instructed the jury, at the instance of defendants except as modified by the insertion of the clause in parentheses, as follows: "That while it is the duty of a city to use reasonable care to keep its streets in a reasonably safe condition to drive upon, it has the right to devote the sides of the street to other useful

public purposes. It may construct sidewalks of a higher grade and gutters of a lower grade than the driveway, place curbing on the line of the gutters, erect hydrants and authorize the erection of hitching posts, telephone, telegraph and electric light poles and the laying of water and gas pipes (provided that in so doing the streets remain in a reasonably safe condition for public use). It may thus to a reasonable extent and for a useful public purpose narrow the driveway and exclude teams and horses altogether from the sides of the streets."

GIRARD A. ELLINGSTON and RECTOR C. HITT, for appellants.

BUTTERS & CLARK, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1100*—*when instruction on right of city to authorize laying of pipes in street correct.* In an action against a gas company and a city for personal injuries resulting to the plaintiff from his wagon running into a gas pipe placed along the side of a bridge with the permission of the city, an instruction to the effect that a city may authorize the laying of water and gas pipes in streets, provided that in so doing the streets remain in a reasonably safe condition for public use, *held* correct.

2. MUNICIPAL CORPORATIONS, § 1107*—*when question whether street suitable for travel is for jury.* In an action for personal injuries resulting from the plaintiff's wagon striking a gas main placed at the side of the roadway over a bridge, evidence *held* to require the submission to the jury of the question whether the roadway was thereby rendered unsafe for public travel.

3. MUNICIPAL CORPORATIONS, § 1098*—*when evidence insufficient to sustain finding that bridge unsafe for travel.* In an action against a gas company and a city for personal injuries sustained

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

as the result of the plaintiff's wagon running against an 8-inch flanged gas main lying on the side of a bridge 24 feet wide, evidence *held* not to support a finding that the bridge was thereby rendered unsafe for public travel.

The People of the State of Illinois ex rel. William Kingsley et al., Appellants, v. David Andrews, Appellee.

Gen. No. 6,235.

1. QUO WARRANTO, § 33*—*what rules govern pleadings.* Pleadings in quo warranto cases are governed by the same rules that prevail in other civil actions.

2. QUO WARRANTO, § 45*—*what defendant must allege.* The defendant in a quo warranto proceeding must either disclaim or justify, and, if the latter, he must show a valid title to the office, the People not being bound to show anything.

3. QUO WARRANTO, § 56*—*when judgment of ouster proper.* Though the People, in a quo warranto proceeding, set out specific causes of disqualification of the defendant to hold the office occupied by him, that is, alienage, still they need make no proof thereof, and unless the defendant shows valid title, a judgment of ouster should be entered against him.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

C. E. MCNEMAR, for appellants; SHEEN & GALBRAITH, of counsel.

CAMERON & CAMERON, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Andrews, 200 Ill. App. 479.

This is an appeal from a judgment for the respondent in a quo warranto proceeding tried by the court without a jury on an information filed by the State's Attorney of Peoria county on relation of three citizens and legal voters of the Township of Kickapoo, in said county, charging that David Andrews, the appellee, was unlawfully holding the office of supervisor of said township. It was alleged in different counts of the information that appellee was an alien, born in the Kingdom of Great Britain and Ireland; that his father was an alien, born in said kingdom and did not take out naturalization papers after coming to America; that appellee was not a legal voter of said township or of the State of Illinois, and was not a citizen of the United States. Appellee pleaded that his father came to this country about sixty-seven years ago and continuously remained in the United States from that time until his death, about the year 1867; that after he had lived and resided in this country the requisite number of years he was naturalized and thereby became a citizen of the United States; that at the time of the naturalization of his father appellee was a resident of the United States and under the age of twenty-one years and thereby became, under the law, a citizen of the United States, concluding his plea with a verification. The People filed a replication to this plea, denying that the father of appellee was naturalized or became a citizen of the United States, and concluded to the country.

On the trial it was stipulated, in substance, that the only question to be tried was whether appellee was at the time of his said election eligible to the said office; that if the court found he was eligible, the judgment should be not guilty, and if the court found otherwise, judgment of ouster should be entered. It was also stipulated that there was no record of naturalization of the father of respondent in any court in Peoria county, Illinois. The People introduced evidence tending to show

that appellee was born in England, some of which the court held competent and some he held not competent, but taken together it was not sufficient proof that appellee at the time of his election was not a legal voter of said township. Appellee offered no evidence. He assumed the burden was on the People to establish the charge that he was an alien and not a legal voter of said township. The court adopted his view of the case and entered judgment accordingly. The only question presented here is whether the court erred in so doing.

Pleadings in quo warranto cases are governed by the same rules that prevail in other civil actions. (*Bishop v. People,* 200 Ill. 33, 36; *Independent Medical College v. People,* 182 Ill. 274; *People v. Heidelberg Garden Co.,* 233 Ill. 290, 294.) The general rule is that the defendant must either disclaim or justify. If he justifies he must set out his title specially and show a valid title to the office. The People are not bound to show anything. He must exhibit authority for exercising the functions of the office or the People will be entitled to judgment of ouster. (*Clark v. People,* 15 Ill. 213, 217; *Carrico v. People,* 123 Ill. 198; *Catlett v. People,* 151 Ill. 16; *Place v. People,* 192 Ill. 160; *People v. Keechler,* 194 Ill. 235, 238; *People v. Central Union Tel. Co.,* 232 Ill. 260, 271; *People v. Baldridge,* 267 Ill. 190, 195; *People v. Garrett,* 157 Ill. App. 377.) It follows, of course, that the respondent must prove his plea. It was said in *People v. Baldridge, supra,* on page 195: "The form of the issue in quo warranto between the State and the respondent is not like that in other civil proceedings, but the defendant is called on to show title by his plea, which presents an issue of fact, and the burden of proof is upon him to establish it."

And in *People v. Keechler, supra,* that it was not sufficient that the plea denies or confesses and avoids the material allegations in the information. The plea "must be good, in and of itself, to show the right of

the respondents to the offices which they are charged with usurping." But *People v. Central Union Tel. Co., supra,* is relied on by appellee to support his position that the burden of proof in this case was on the People because while they might have alleged usurpation of the office in the most general terms they did not choose to do so but made specific charges of disqualification which appellee assumes places the burden of proof on the People. The court held in that case that the office of an information in the nature of a quo warranto is not to tender any issue of fact but simply to call upon the defendant in general terms to show by what warrant or character the privilege claimed is held or exercised, but also said that it was the privilege of the People to make the information specific and set out particular acts as usurpation of authority, or set out special causes of forfeiture. We do not regard that case as holding that the People may in an information, by setting out the causes of disqualification, tender an issue of fact that the respondent may meet by a general denial, concluding to the country. Appellee did not adopt that theory in pleading, but, as we have before stated, concluded his plea with a verification. We are of the opinion that under the law and the pleadings in this case the burden was on appellee to show his title to the office, and as he introduced no evidence and the record contains no evidence supporting appellee's plea, the court erred in rendering judgment in his favor.

Appellee relies also on the authority of decisions in election contests in this State holding where alienage is charged that the burden of proof is on the party charging it. The rule announced in these cases is not applicable in quo warranto proceedings which are governed by the rules announced in the cases before cited. The question of how much and what character of proof would have been required of appellee to make a prima facie case of citizenship is not before us. There is no

proof in the record that appellee had exercised the rights of a citizen and voter or that his father exercised such rights and privileges. The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

W. L. McCloud, Appellee, v. W. H. Hogle and Frank A. Gilbreath, Appellants.

Gen. No. 6,246. (Not to be reported in full.)

Appeal from the Circuit Court of Iroquois county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action for fraud and deceit by W. L. McCloud, plaintiff, against W. H. Hogle and Frank A. Gilbreath, defendants. From a judgment for plaintiff against him, W. H. Hogle appeals.

The plaintiff was a dealer in automobiles and Hogle was a merchant. Gilbreath on and before May 7, 1910, owned one hundred and twenty acres of land in Issaquena county, Mississippi, subject to a first mortgage of about $250. On that date he gave a second mortgage on the land to one Sam Finney to secure an indebtedness said to have grown out of bucket shop transactions. There being default in payment of the mortgage, Finney foreclosed the equity of redemption in a proceeding in the Chancery Court of Issaquena county. The record of that court shows that on December 6, 1911, there was a finding: "That publication has been duly made in the manner and form and for the time

required by law," and Gilbreath and his wife, the defendants in the suit, were defaulted and the bill taken as confessed against them. The next day a decree of sale was entered barring the defendants' equity of redemption upon the making of the sale. The sale was made pursuant to the order in the decree to Sam Finney for $500, which was approved by the court July 17, 1912. More than a year afterwards, August, 1913, Hogle offered to trade plaintiff Gilbreath's supposed equity in this land for an automobile valued at $1,650, stating positively that the title to the land was in Gilbreath subject only to the first mortgage. A bargain was made and Hogle signed a memorandum in writing in which he agreed to furnish a deed of conveyance from the owner of the land to plaintiff, and to clear the land of incumbrance and pay $650 in cash for the automobile. Plaintiff inquired about the value of the land and the amount due on the first mortgage, which he learned was $261.05. Hogle procured Gilbreath and wife to convey the land by warranty deed to plaintiff, subject only to the first mortgage, and gave plaintiff his check covering the $650 cash payment and the $261.05 necessary to pay and discharge the mortgage, and took the automobile. Plaintiff paid the mortgage and sent a release with his deed to Issaquena county for record and did not discover for several months afterwards that he had no title to the land. Hogle had traded Gilbreath an old automobile for his supposed equity of redemption, and said he had no knowledge of a second mortgage and that he procured the deed direct from Gilbreath and wife to McCloud to save a recording fee, and for no other purpose; that he supposed there was no other incumbrance on the land, though Gilbreath had before told him there was a judgment against him down there in Mississippi but it was for a gambling debt and was not good; that he did not tell plaintiff about the judgment because he did not consider it valid; that he always understood a gambling judgment

was not good, and that Gilbreath had told him there was no service on him, and he took Gilbreath's word that the judgment was invalid.

John P. Pallissard, a lawyer who was representing Gilbreath in the trial of this case, was called by plaintiff as a witness and testified that he prepared the deed from Gilbreath and wife to plaintiff at Hogle's instance, but that at sometime prior to that transaction, Hogle had come to inquire about the land, and said Gilbreath had suggested that he do so. Pallissard at the time knew something about the title and knew about the Finney mortgage. He testified that he went into the title pretty thoroughly in his discussion with Hogle; that the Finney mortgage may not have been mentioned by name, but it was mentioned that there was a second mortgage. Hogle denied this conversation and denied that he was ever informed by anybody before the deed was made that there was a second mortgage on the land.

NELLY B. KESSLER and EDWARD P. HARNEY, for appellants.

FRANK HARRY, for appellee; J. W. KERN and C. G. HIRSCHI, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. EXCHANGE OF PROPERTY, § 8*—*when evidence sufficient to show making of false statement as to title relied upon by purchaser.* Where the defendant in an action for fraud and deceit, in the representation as to title to land, informed the plaintiff that certain land which he caused to be deeded to the plaintiff was unincumbered except as by a first mortgage, and on the trial admitted that the owner had told him that there was a judgment on record against

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

resulting from the plaintiff's being struck by a street car, after alighting from another car going in the opposite direction, an instruction to the effect that it was as much the duty of the plaintiff as of the motorman to keep a lookout, and that if the plaintiff did not keep such a lookout the defendant should be found not guilty, *held* confusing in not stating what kind of a lookout was required of the plaintiff.

7. STREET RAILROADS, § 91*—*what lookout must be maintained by pedestrian crossing tracks.* A pedestrian crossing a street car track is required to keep such a lookout as ordinarily prudent people would do under similar circumstances.

8. TRIAL, § 124*—*when remarks of counsel ground for reversal.* In an action for personal injuries against a street car company where the plaintiff's attorney made remarks of a nature to influence the passions and prejudice of the jury, the judgment was reversed.

9. DAMAGES, § 179*—*what admissible on question of loss of future earnings.* In an action for personal injuries, proof of a contract of the plaintiff for future employment, *held* admissible on the question of loss of future earnings.

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

PAGE, HUNTER, PAGE & DALLWIG, for appellant.

JOHN B. KING and LEO G. HANA, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Alice Eilers, the appellee, a girl seventeen years old, was in the nighttime a passenger on a southbound street car of the appellant company in the City of Peoria. As the car stopped, according to its custom, at the far side of an intersecting street, she alighted from the rear and after it started walked diagonally across the track on which she had been riding and an intervening space between that track and appellant's northbound track, and as she stepped upon the northbound track was struck and injured by a northbound car.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

She, by her next friend, brought this action to recover for that injury alleging, as defendant's negligence in different counts of her declaration, careless and negligent management of the defendant in running its cars. A violation of a city ordinance requiring conductors and drivers of street railway cars to keep vigilant watch for all persons on the track, and at the first appearance of danger to such persons to stop the car in the shortest time and space possible. A violation of another ordinance requiring street cars to be provided with signal lights and equipped with a gong or other suitable device to be sounded or rung at least one hundred feet from where the track intersects any other street and kept sounding or ringing until such street is reached, and that the northbound car by which she was injured approached the street intersection in a careless manner. There were other appropriate allegations in the declaration showing the facts before stated and alleging due care and caution of the plaintiff in alighting from the car and attempting to cross the northbound track of the defendant, and alleging permanent physical injury resulting in pain and sickness and prevention from transacting her affairs and business which before that time had engaged her attention. She had a judgment on a verdict of $3,350, from which the company prosecutes this appeal.

Appellant first contends that this is a plain case of contributory negligence. The argument supported by the evidence is that appellee might have seen and avoided the danger. This is true in most grade crossing accidents. Usually it is easy to demonstrate that a greater degree of care would have saved the plaintiff from injury, still, the question is whether the degree of care exercised by the plaintiff was such as would ordinarily be used by prudent persons under similar circumstances, and unless there is but one reasonable conclusion the question must be left to the jury as one of fact, subject to the supervision and review of the

trial judge and of this court. We are of the opinion that this record presents a case where the court did not err in refusing to direct a verdict for the defendant. As the judgment must be reversed for reasons hereinafter stated, we express no further opinion as to the weight of the evidence.

The jury were told in the first of appellee's given instructions, if the plaintiff at the time in question was in the exercise of ordinary care for her own safety and the defendant was guilty of negligence as charged, etc., then the verdict should be for the plaintiff. And in appellee's second given instruction that there is no rule of law which prescribes any particular act to be done or omitted by a person who finds herself in a place of danger that will constitute ordinary care; that the only requirement of law is that her conduct at such time should be consistent with what a person of ordinary prudence would do under like circumstances. The main inquiry on the question of plaintiff's care was whether she was in the exercise of ordinary care in placing herself on the northbound track. Appellant argues that these instructions, taken together, ignore that question and confine the jury's attention to what plaintiff did after she found herself in danger on the track. There is some force in this criticism, and the instructions in that respect should be more carefully guarded on another trial. Numerous authorities are cited by counsel on each side holding that character of instruction good and bad. Whether good or bad in any given case depends largely upon the facts of that case, and whether it is likely from a consideration of the facts and the other instructions the jury's attention might have been improperly confined to the conduct of the plaintiff after she found herself in danger, to the exclusion of the inquiry of the propriety of her placing herself in danger. Appellee's fourth given instruction told the jury that a pedestrian has a right to expect that a street railway company will not run a car past a car discharg-

ing passengers without giving warning and observing the ordinances of the city governing the operation of cars, if any. This instruction was bad in deciding as matter of law a question of fact. (*Louisville, N. A. & C. Ry. Co. v. Patchen,* 167 Ill. 204; *North Chicago St. R. Co. v. Irwin,* 202 Ill. 345; *Brun v. P. Nacey Co.,* 267 Ill. 360.) Appellee's fifth given instruction was to the effect that if the jury found the defendant guilty, then in assessing damages they might take into consideration bodily disability occasioned by the accident and any impairment of the plaintiff's mental faculties and general health proven which the jury believe from the evidence will affect or impair her future ability to attend to her ordinary affairs of life the same as if the injury complained of had not occurred. The evidence on which the theory of permanent impairment of mental condition rested was that of a physician that it was likely that there would be a gradual increasing of appellee's irritability—"Probably some abnormal mental condition later on will develop." Under the authority of *Amann v. Chicago Consol. Traction Co.,* 243 Ill. 263, 267; *Lauth v. Chicago Union Traction Co.,* 244 Ill. 251, and *Lisenbury v. St. Louis & S. Ry. Co.,* 184 Ill. App. 395, this evidence of what was "likely and probable" (which was objected to) was improperly admitted and its effect emphasized by the giving of this instruction. Appellee's seventh given instruction told the jury, among other things, if they believed plaintiff sustained damages as charged in the declaration, that in estimating damages for permanent injury or for pain and suffering: "It is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may, themselves, make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observations and experience in the ordinary affairs of life." One item of damages charged in the declaration is plaintiff's inability to attend to the

ordinary affairs and business which prior to that time had engaged her attention. Appellee proved the rate of her earnings immediately before the time of the injury and a contract as to future earnings. Damages assessed on this item of loss of future earnings must have been based on evidence and not on the jury's knowledge, observation and experience in the ordinary affairs of life; therefore this instruction was erroneous. (*Elward v. Illinois Cent. Ry. Co.*, 184 Ill. App. 107.)

The court refused an instruction offered by appellant as follows: "You are further instructed that it was as much the duty of the plaintiff to keep a lookout for approaching street cars as it was the duty of the motorman of the street car testified about to keep a lookout for approaching persons, and if you believe from the evidence that the plaintiff failed to keep such a lookout and that such failure on the part of the plaintiff helped to bring about the injury testified about, then the plaintiff cannot recover and you should find the defendant not guilty." Appellant argues that the first part of the instruction informing the jury as to the relative duties of the plaintiff and the defendant in keeping a lookout is good law, and cites authorities to support that position. Assuming that to be so, we think the instruction bad in telling the jury if the plaintiff failed to keep such a lookout then she could not recover. It is not clear from that language what lookout the jury might presume was required as matter of law. The law required the plaintiff to keep such a lookout as ordinarily prudent people would do under similar circumstances. This instruction would not have aided them, and was properly refused on the ground that it might tend to confuse the jury if not on the ground that it was stating as matter of law what should be left to the jury as a question of fact.

Appellee's counsel in his closing argument to the jury charged appellant's counsel with stooping to rot-

ten methods to put up a defense in the case. The court sustained an objection to that statement. He then referred to appellant as a "gigantic octopus," that "You, the people of the City of Peoria, have permitted to wield its tentacles through your city streets," and added, "The least consideration it could pay you in return is to operate its cars according to the rule of law, which would have safeguarded this young girl as well as you and all the rest of this community." Again he said: "In determining the amount of damages to which this woman is entitled, and I ask you to consider well who are the parties. The defendant, our largest local corporation, operated, as it is,—counsel tried to tell you in his opening statement, purely in the interest of public welfare, with just probably now and then a credit, not to you and me, but to a select few who can afford to own its stock." The court sustained an objection to this statement. He then appealed to the jury to return a verdict extending the same measure of consideration to the plaintiff that they would ask if she were their sister or daughter, or other loved one invoking judgment at the hands of a jury, and added: "You need have no fear that your fellow citizens in Peoria County will accuse you of any dereliction of duty because you say by that returned verdict in behalf of this plaintiff, which will preserve and keep her in a moderate degree of comfort as her pitiable condition will permit." It is apparent that these suggestions were intended to inflame the passions and prejudices of the jury and direct their attention to considerations having no legal bearing on the questions submitted to them for decision. Cases are numerous where judgments have been reversed because of improper conduct and suggestions by counsel on the trial, and while as a rule the trial court should be left largely to judge of the influence of improper remarks and conduct and may obviate any evil effect therefrom by his rulings on objections to the same, still there are cases in which

the mischief is done beyond remedy by any ruling of the court. (*Wabash R. Co. v. Billings*, 212 Ill. 37, 41.) The Appellate Court of the Third District in *Illinois Cent. R. Co. v. Seitz*, 111 Ill. App. 242, well said:

"There is enough natural and inherent prejudice in the minds of jurors against railroad and other corporations without having it augmented by direct and improper appeals calculated to arouse the sympathy, passion or prejudice of jurors. A lawyer who tries his case in a proper manner, observing the ethics of the profession, is at a great temporary disadvantage when trying a cause against counsel who resort to improper language to obtain a verdict. Verdicts thus obtained generally are and always should be short-lived. Trial courts should set them aside as often as they are obtained. It is the policy of this court to discourage such misconduct on the part of lawyers by reversing judgments obtained by them when it is manifest they are the result of unprofessional conduct."

Great care is exercised in impaneling juries to obtain men free from prejudice that might bias their fair consideration of the facts upon which, as matter of law, their verdict should depend. If a juror on his *voir dire* were to admit that he had prejudices such as were sought here to arouse, he would not be permitted to sit in the case. The law is so careful in this respect that changes of venue are granted at much expense and inconvenience to parties and witnesses if necessary to avoid prejudice on the part of the jury against one of the litigants. The whole purpose of the law to obtain a trial by a fair and impartial jury is defeated if appeals to their passions and prejudices are to be permitted during the course of the trial. Reviewing courts have always consistently condemned such conduct and often reverse judgments for no other reason. Among the many cases illustrating this principle are the following: *Peoria, B. & C. Traction Co. v. Vance*, 234 Ill. 36; *Chicago Union Traction Co. v. Lauth*, 216 Ill. 176; *Appel v. Chicago City Ry. Co.*, 259 Ill. 561;

McCoy v. Chicago & A. R. Co., 268 Ill. 244; *Chicago Union Traction Co. v. Wirkus*, 131 Ill. App. 485; *Chicago Union Traction Co. v. Faurot*, 136 Ill. App. 347; *Parlin & Orendorff Co. v. Scott*, 137 Ill. App. 454, and cases there cited; *Swinosynski v. Kelly Coal Co.*, 146 Ill. App. 120; *Upthegrove v. Chicago Great Western Ry. Co.*, 154 Ill. App. 460.

Appellee was permitted to prove a contract with her employer as to future wages in case of her contemplated continuing in his employment. This is urged as error by appellant, but we see no reason why not only the earnings of the plaintiff at the time of her injury but also the wages that she had contracted to receive in the future if she were not injured is not a proper subject of inquiry. The evidence is rather meagre as to this contract, and it is no doubt true if the supposed contract amounted to an offer that was not accepted or something short of a substantial contract for employment and increased wages it would not be competent evidence. For the errors before indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

David M. Swain and Verne Swain, Appellees, v. Herman F. Mehl, Appellant.

Gen. No. 6,274.

1. JUSTICES OF THE PEACE, § 97*—*when statements of counsel substitutes for pleadings.* Where, on the trial of a case in a justice's court, counsel for the plaintiffs stated to the jury that the plaintiffs had to prove that the act of the defendant, upon which the action was based, was negligently and wilfully done, and the defendant's counsel said that the defendant was not guilty in manner and form charged, and the court said that he had had the reporter take down the opening statements, and they took the place of the pleadings, *held* that the plaintiffs, in order to recover, had to prove wilfulness, and that the defendant was only required to defend that charge.

2. DAMAGES, § 190*—*when evidence insufficient to sustain verdict.* Where, in an action for the negligent destruction of piling, there was no evidence what such piling was worth, and no evidence that new piling, put in by the plaintiffs in place of the old, was of the same or similar character as the old, and no evidence what such new piling was reasonably worth, *held* that a verdict, based on the amount of the bill paid by the plaintiffs for such new piling, could not be sustained.

3. DAMAGES, § 50*—*what not measure for destruction of property.* Where property has been destroyed by the defendant and replaced by the plaintiffs, the rule as to the measure of damages where property is injured by the defendant and repaired by the plaintiffs does not apply.

4. INSTRUCTIONS, § 135*—*when necessary that request for be made.* Where a party requests no instructions as to the measure of damages, he cannot complain of the failure of the court to give any.

5. TORTS, § 12*—*when person liable for destruction of piles in navigable stream.* Though piles are maintained in a navigable stream in violation of law, it does not follow that one wrongfully destroying them incurs no liability to the one who drove and maintained them.

6. APPEAL AND ERROR, § 1035*—*when errors not reviewed.* Rulings of the trial court, on which no errors have been assigned on appeal, are not before the reviewing court.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Appeal from the Circuit Court of Marshall county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

B. W. WRIGHT and QUINN & QUINN, for appellant; FRANK J. QUINN and JOHN E. DOUGHERTY, of counsel.

BARNES & MAGOON, for appellees; WALLACE J. BLACK, of counsel.

MR. JUSTICE CARNES delivered the opinion of the court.

David M. Swain and Verne Swain, the appellees, about 1891, drove a cluster of seven or eight wooden piles in the Illinois River (a navigable stream) at Lacon, Illinois, for an aid in landing boats. The original piling stayed there seven or eight years. The life of a pile is said to be about ten years. Appellees replaced piles as they became useless from time to time from 1891 to 1914. They were used by appellees and other boatmen and were apparently an aid to navigation. In 1914 appellant's boat collided with and broke them down. Appellees caused other piling to be driven in their place, whether similar or different does not appear, and paid for the material and labor a bill of $92.40. They brought this suit before a justice of the peace to recover said amount, and judgment for the defendant was there rendered. On appeal in the Circuit Court evidence was introduced by the plaintiffs only. The court denied the defendant's motion for a directed verdict and the jury rendered a verdict for said sum of $92.40, on which judgment was entered, from which this appeal is taken.

Appellees' counsel in his opening statement to the jury said: "We have to prove that it was negligently done and that it was wilfully done." The defendant's counsel said he, the defendant, was not guilty in manner and form complained of against him. The court

said: "I have had the reporter take down the opening statements, and it takes place of the pleadings." While this did not constitute a statement of the plaintiffs' demand under section 19 of our Justices Act (J. & A. ¶ 6915), and while opening statements of counsel are not ordinarily to be taken in the place of pleadings, still we think under the facts above stated we should assume that the plaintiffs undertook to prove a wilful destruction of the piling, and for the purposes of the trial the defendant was only required to defend that charge. There is no evidence to support a finding of wilful conduct. Appellees in their statement here of what they have proved only claim negligence in the operation of appellant's boat. Wilfulness is something quite different from negligence.

There is no evidence showing what the piling that was destroyed was worth, and, as we have said before, no evidence that the new piling was of the same or similar character. There is no evidence that it was reasonably worth $92.40 to procure and place this new piling. Even if the measure of damages was the cost of replacement, for the reasons above given the evidence would not support the verdict based on the amount of the bill paid. Appellees cite the decision of this court in *Crossen v. Chicago & J. Elec. Ry. Co.*, 158 Ill. App. 42, holding: "When personal property has been injured by the negligence of another and can be repaired, the proper measure of damages is the cost of the repairs and the value of the loss of the use of it while it is being repaired." That rule was announced on the authority of *FitzSimons & Connell Co. v. Braum*, 199 Ill. 390, and is the law. But the court added: "If the property could not be repaired, then the measure would be the difference between the market value of the property before the injury and the value of the wreckage." In the present case the property was not repaired, it was replaced, and there-

fore was not within the rule announced in the above cited cases as to repairing damaged property. If it was, the evidence that appellees had paid a certain bill without any evidence whatever to show the character of the work or the resonableness of the bill, or whether it was a usual and customary charge, is hardly sufficient to support a verdict for the amount of the bill. The only Illinois case we know of indicating that the amount paid might be taken as a basis of recovery is *Travis v. Pierson,* 43 Ill. App. 579. We noticed that holding in *Chicago Great Western R. Co. v. American McKenna Process Co.,* 200 Ill. App. 166, and expressed a doubt whether the rule could be taken as one of general application. For the reasons above indicated the judgment must be reversed.

For the purposes of another trial we should say that appellant urges here that it was error to submit the case to the jury with no instructions as to the measure of damages, and cites a decision of this court in *Comstock v. Price,* 103 Ill. App. 19, holding that instructions which do not state the rules of law upon which plaintiffs' damages are to be assessed but leave the jury to judge what were the proper elements of damage and open before them the field of speculation and conjecture are erroneous. That was said with reference to an instruction as to the measure of damages that did not correctly inform the jury on what basis they should act. Nothing in that case affords any ground for a claim that the court should, of his own motion, have instructed the jury as to the measure of damages. The authorities are too numerous in this State to require citation that the trial court is under no duty, of his own motion, to instruct the jury as to any matter of law involved in the case. In the present case there was no instruction given for the plaintiffs except as to the form of verdict. The defendant offered no instruction on the measure of damages, therefore there was no error in this respect.

There is a Federal statute referred to in *Cobb v. Lincoln Park Com'rs,* 202 Ill. 427, 437, which may be found in Federal Annotated Statutes, vol. 6, sec. 10, p. 813 (Rivers, Harbors and Canals), making it a penal offense to build any pier in any navigable river or other water of the United States outside of established harbor lines, or where no harbor lines have been established except on plans recommended by the chief of engineers and authorized by the secretary of war. The record does not affirmatively show that the new piers were driven in violation of that statute. If they were, it hardly seems possible a recovery could be permitted for an amount expended in doing an illegal act. If the piling broken were maintained there in violation of this statute, we do not presume that that of itself would exonerate a defendant charged with destruction of property. While it is true, as held in *Marcy v. Taylor,* 19 Ill. 634, that a person may remove a fence erected across a highway without being guilty of a trespass, it does not follow that no liability was incurred by appellant if he wrongfully destroyed the piers in question, even though they were maintained there in violation of law. (*Bayley v. Nichols,* 263 Ill. 116.)

Appellees say that the court erred in not permitting proof of a similar act by appellant at another time and place, and argue that it was competent as tending to show wilfulness. No cross error is assigned, therefore that question is not before us. The judgment is reversed and the cause remanded.

Reversed and remanded.

Westchester Fire Insurance Company, Appellant, v. Herman Struck, Appellee.

Gen. No. 6,280.

1. ACCOUNT STATED, § 15*—*when no presumption that omitted items not chargeable.* The rule that omission of items from repeated statements of accounts raises a presumption that such items are not properly chargeable does not apply where certain items are omitted under an express agreement of the parties.

2. CONTRACTS, § 285*—*what does not constitute an abandonment of a claim under contract.* Failure to demand or collect during a period short of that fixed by the statute of limitations does not amount to an abandonment of a claim under a contract.

3. INSURANCE, § 64*—*when failure to demand payment does not defeat recovery by agent on contract for extra commissions.* Failure of an insurance agent, for a number of years, to demand payment for extra commissions earned, where there was no evidence of an intent to abandon the claim, *held* not sufficient to defeat a recovery for commissions which became payable within the period limited by the statute of limitations.

4. INSURANCE, § 64*—*when action by insurance agent on contract for extra commissions not prematurely brought.* In an action by an insurance agent to recover extra commissions which, according to contract, were to be a certain percentage of the excess of premiums over losses during each year of the agent's employment, the action having been brought after the termination of such yearly periods, *held* that the possibility that there might be future losses on policies in force at the time of the institution of the action was immaterial.

5. CONTRACTS, § 349*—*when third person may maintain action on in his own name.* An insurance agent who had, under a trade name, contracted with an insurance company for commissions, *held* entitled to recover under the contract in his own name, he having at all times been the sole proprietor of the business, which fact was known to the company.

6. APPEAL AND ERROR, § 1494*—*when exclusion of evidence as to existence of partnership harmless error.* In an action, brought in his own name, by an insurance agent to recover commissions under a contract entered into by him under a trade name, *held* that the ruling out of evidence offered by the insurance company to show that the plaintiff was not the only one interested in the business

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

but that he was in partnership with another at the time of making the contract, was harmless error, if error at all, the evidence being so strong as to leave no doubt that he was the sole proprietor of the business and that the defendant company knew it.

7. INSURANCE, § 64*—*when instruction in action by agent for commissions under contract correct.* In an action by an insurance agent for commissions, under a contract calling for payments at yearly intervals, an instruction that such contract, if proven by a preponderance of the evidence, would, as a matter of law, be presumed to be in force until it was shown by the evidence that it had terminated, or that it was the intention of the parties to abandon or rescind it, *held* proper.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

COVEY, CAMPBELL & COVEY and EVANS & EVANS, for appellant.

CLARENCE W. HEYL and HARRY C. HEYL, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Herman Struck, the appellee, was agent of the Westchester Fire Insurance Company, the appellant, continuously at Pekin, Illinois, from 1894, and also at Peoria, Illinois, from 1900 until March, 1914, when appellant terminated his agencies. On and after November, 1913, he collected at said agencies $1,539.40 of appellant's money and refused to turn it over, claiming that appellant was indebted to him on a contract for extra commissions. This action of assumpsit was brought to recover that amount. Appellee pleaded a tender of $55.70, and a set-off of $1,488.97. Appellant replied a general denial to each plea and the Five-Year Statute of Limitations to the plea of set-off. On the trial the defendant was permitted to open

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and close the case. The tender was proven without controversy. The claim for extra commissions was confined to a period of five years before the beginning of the suit. For that reason we assume no point is here made on the statute of limitations. The main contention is whether appellee is, on the merits, entitled to judgment on his plea of set-off. There was a verdict for the defendant and judgment on that verdict against the plaintiff for costs, from which this appeal is prosecuted.

During most, if not all, the time that appellee was so acting as agent there was in that district a union among certain insurance companies, including appellant. This union employed an inspector and maintained an inspection bureau whose business it was to see that such company obtained proper rates on all policies written, maintained the agreed scale of commissions to its agents, and observed other rules of the union. Agents' commissions were fixed on what was called the "graded scale" of fifteen, twenty, and twenty-five per cent. according to a classification of risks. Agents books were kept showing their business and monthly reports made through this inspection bureau. While appellee was acting as agent only in Pekin before his appointment at Peoria, appellant had some agreement with him, apparently in violation of union rules, to pay him an extra or bonus commission of ten per cent. on the net premiums after the deductions of losses paid for each year in addition to his graded commissions. After his appointment at Peoria it appears that in 1901 an authorized agent, now deceased, of appellant made a contract with him that he should continue to receive the same bonus or extra commission on his business at both offices so long as appellant's company remained in his office, and that the extra commission would be paid to him directly, and that he should keep no record of the matter on his

books and make his reports as though no such contract existed. The reason for this secrecy is obvious. Because of the death of the agent appellee did not testify to the contract, but it was proven by his bookkeeper, and letters of the agent were admitted in evidence, leaving no doubt that such contract was made. Appellee testified that it was never changed. The basis of computation was on the annual premiums received and annual losses paid. We need not enter into that in detail, because we do not understand appellant to deny that the amount claimed in the plea of set-off is correct if the contract was in force during the last five years of appellee's agency, except two objections that we will notice hereafter.

Payments were made to appellee covering extra commissions before July 1, 1901, but after that time until November 1, 1913, he made no claim on appellant for commissions above the graded scale. He made monthly reports of his business and settlements thereon during that period that showed business done, commissions charged and collected, and settlements made in accordance with the union agreement. The company sustained large and unusual losses in that district in the period from 1901 to 1909, which is said by appellee's counsel to account for no claim made during that time. The son of appellee was appointed State agent of appellant about August, 1909, and so acted until 1913, apparently with authority to adjust such matters. Appellee talked with him, as such agent, about this bonus commission and told him it ought to be paid, and his son told him that he knew about the deal in Peoria and Pekin; that he had read letters to him written by his predecessor, but asked him not to press the matter while he was acting as agent, or something to that effect. The son testified that he was told by an officer of appellant when he assumed his duties that he would find any number of those contracts

for extra commissions and he would have to treat them very carefully because it was something out of the ordinary.

Appellant devotes a large part of its brief to a citation of and quotations from authorities on the effect of accounts stated or settled and acquiesced in for a long time. It is true that ordinarily repeated statements of accounts omitting certain charges raise a strong presumption that such items are not proper charges for collection. Whether presumptions of law or fact, as a rule, arise from such a course of stating accounts and settlements thereon, we need not discuss, because we know of no law and can see no reason for applying such a rule to a case like this where the items were omitted under an express agreement that the account should be stated in that way. Appellant also insists that the failure to make any demand for payment for so long a time should be construed as an abandonment of the claim. There is certainly no rule of law that treats a failure to demand and collect as an abandonment of the claim, or that denies the claimant's right to collect in any period short of that fixed by the statute of limitations. It was said in *Evans v. Gerry*, 174 Ill. 595, 604: "Where an abandonment or waiver is relied upon, it must be shown to have been the clear intention of the parties to abandon the contract previously entered into. (*Mix v. White*, 36 Ill. 484.) Courts will indulge no presumptions in favor of a waiver of a contract where specific performance is attempted to be enforced, nor will it infer waiver or abandonment upon slight proof. (22 Am. & Eng. Encyc. of Law, 1062.)" This case was cited and its doctrine reaffirmed in *Turn Verein Eiche v. Kionka*, 255 Ill. 393, 398. We see no ground for holding that the contract was abandoned. The presumption is that the contractual relation continued to exist. (1 Corpus Juris, page 7.)

Appellant claims that there is no proof of the amount of loss on business of 1914; therefore no basis for computation for that year. Appellee did make sufficient proof as to losses of 1914 to make a prima facie case as to that item. If they were greater than he showed, it was in the power of appellant to show that fact. There is a suggestion by appellant that there might be future losses on policies in force at the time the suit was commenced, and therefore the net premiums could not then be computed, and the suit was prematurely brought. We may not understand appellant's position. As we understand the contract, settlements were to be made each year on the basis of receipts and losses of that year. In this view of the contract the data was before the jury if the receipts and losses in each year were sufficiently shown.

Appellee, Struck, at and sometime before the Peoria contract for extra commissions was made, was doing business under the name of Jas. A. Edds & Company. The agency was owned by appellee. No other person had any interest in it. It was not a corporation, or partnership. About five years before the present suit was begun he changed the name both at Peoria and Pekin to Herman Struck. There is no controversy about these facts, but appellant claims that if it made the Peoria contract for extra commissions, as charged, it was with Jas. A. Edds & Company, and as the amount charged and recovered for in the plea of set-off accrued in the agency of Herman Struck, he could not recover under the contract with Edds & Company. The evidence is not only clear, as above stated, that Edds & Company was simply a trade name used by appellee in which he did business and made his reports to the company for a term of years, but it is also we think clear beyond question that appellant knew that fact. Appellant's letters written to appellee in relation to this contract about the time it was made in 1901 were addressed to him personally; the contract

was made with him personally. There is an indication that the name of the agency was changed because of a rate war at Pekin. We do not think any significance should be attached to the fact of appellee's using this trade name. Objections were sustained to questions asked him and his bookkeeper in their cross-examination in relation to the use of that name which counsel stated were asked for the purpose of showing that the firm was composed of two men, and that at the time of the alleged agreement in 1901 the business in Pekin and Peoria was carried on in the firm name. If it was error to sustain such objections, it did no harm, as there was no question that the business was carried on at that time in the firm name, and the affirmative evidence that appellee was the only party interested, and that appellant knew it, is so strong as to leave no doubt about that matter.

Appellant argues that the court erred in instructions to the jury, and summarizes that contention by saying that there is no evidence in the record tending to show the agency was for any specific length of time. (In which, as we have before seen, it is mistaken.) It says the agency was subject to revocation at any time because there was no express agreement for a fixed time, and that the court refused to adopt its theory that the repeated statements of account by appellee and acquiescence in the same by the company constituted settlements from time to time, but instructed the jury, at the instance of appellee, that if he had shown by a preponderance of the evidence that the contract for extra commissions was entered into as claimed by him, then, as matter of law, the contract is presumed to be in force until it is shown by the evidence that it terminated, or that it was the intention of the parties to abandon or rescind it, and refused instructions offered by appellant to the effect that if the parties made settlements based on such reports and the course of dealing from July 1, 1901, to November 1, 1913, led

appellant and its officers to believe that appellee was writing insurance on such graded commissions, then it would be a fraud upon appellant for appellee to afterwards claim a greater commission than he had been making settlements for during the period covered by those statements, and he would be estopped from claiming any greater commissions than charged in his reports, and that the instructions of the court withdrew from the jury's consideration appellant's defense that the conduct of appellee in making settlements estopped him to claim the bonus commission. As we have before said, we do not think his conduct did so estop him as matter of law or matter of fact. He did not put his claim into his settlement statements because he had expressly agreed not to do so. The court could not instruct the jury as matter of law that the failure to demand payment of a valid claim short of the period of the statute of limitations should be considered as an abandonment of waiver of the claim, or as fraudulent on the part of the claimant. We do not think appellant's criticism of the instructions well grounded. For the reasons above stated the judgment is affirmed.

Affirmed.

NIEHAUS, P. J., took no part.

Edwin Romberg, Appellee, v. Interstate Independent Telephone & Telegraph Company, Appellant.

Gen. Nos. 6,283, 6,284.

H. D. Kellogg, Appellee, v. Interstate Independent Telephone & Telegraph Company, Appellant.

Gen. No. 6,285.

BONDS, § 25*—*when holder of interest coupons secured by trust deed has right of action.* A trust deed securing bonds and interest coupons, *held* neither expressly nor impliedly to deprive the holder of coupons of a right to bring an action thereon at common law.

Appeal from the Circuit Court of Kane county, as to Gen. No. 6,285, and County Court of Kane county, as to Gen. Nos. 6,283, 6,284; the Hon. MAZINNI SLUSSER, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

FRED A. DOLPH, WILLIAM H. GALLAGHER and R. HAROLD O'CONNOR, for appellant; E. J. MARSHALL, of counsel.

ALSCHULER, PUTNAM & JAMES, for appellee Romberg.

ROBERT G. EARLEY and WENTWORTH, CAVENDER & KAISER, for appellee Kellogg.

MR. JUSTICE CARNES delivered the opinion of the court.

The three cases above entitled were each begun in a justice of the peace court to recover on interest coupons attached to bonds issued by the appellant. Each tried on appeal in the court above indicated resulting in a judgment for the amount claimed, and appeal to this court. The same questions are involved, the same

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

briefs and arguments are printed and filed in each case. Each of the first two cases was for eight coupons, on which judgment was entered for $200. The third is on two coupons, on which judgment was entered for $51.86. Appellant says:

"The question involved in all of the cases is the right of an individual coupon holder to bring an independent action at law without reference to the rights of his co-bondholders or without notice to the trustee in the trust deed securing the bonds, where the trust deed conveys all property of the corporation of every kind in trust for the equal and pro rata security of all bonds without preference or priority and where the trust deed specifically vests all right of action in the trustee."

Which question we would answer in the negative if it were true that the trust deed specifically vested all right of action on the coupons exclusively in the trustee. The coupons were the usual form, and were attached to bonds secured by a trust deed covering all the property of appellant. A large part of appellant's brief is devoted to the propositions that the coupons, bonds and trust deed are all to be taken as a part of the same contract; that the holders of the coupons are charged with notice of and are bound by all the restrictions contained in the trust deed, and while not denying the right of these holders of coupons to bring these actions thereon in the absence of any restraining provision in the trust deed, appellant insists that there are such restrictions in that instrument contained precluding these actions by the plaintiffs, and cites many cases in support of its contention that the holder of coupons cannot maintain an action at law thereon in violation of stipulations in the trust deed securing the bonds to which they were attached forbidding such action. *Belleville Sav. Bank v. Southern Coal & Mining Co.*, 173 Ill. App. 250, and *Boley v. Lake St. El. R. Co.*, 64 Ill. App. 305, are cited and much relied on to sup-

port that position. It is assumed that those cases, if accepted as authority, control the decision here. In the *Belleville Savings Bank* case, *supra,* there was an expressed provision in the trust deed: "That no holder of any *bonds* or *coupons* should have the right to institute any action at law upon any *coupon,* or institute any suit or proceedings in equity, or otherwise, under said instrument except in case of refusal on the part of the trustee," etc. In the *Boley* case, *supra,* the trust deed provided that: "Under no circumstances shall the holder of any bonds or coupons, or any number of such holders, have any right to institute any action at law upon any *coupon* or *coupons,* or otherwise, or any suit or proceedings in equity or otherwise, under this indenture, for the purpose of enforcing any payment, covenant or remedy herein, or in said bonds contained, * * * except in case of refusal on the part of the trustees," etc. In those two cases these restrictions were held binding on the holder of coupons. But in the *Boley* case the court said on page 313: "Provisions of this kind are to be strictly construed," citing many authorities.

Appellees say they are willing to concede that their right of recovery depends upon whether or not there are any restrictions in the trust deed, which deprive them of their common-law right of action, and insist there are no such restrictions. Without further investigation or discussion, we will assume that the two above cited Appellate cases are good law, and discuss the question left by counsel for our consideration whether there are any such restrictions contained in the trust deed.

The parts of that instrument deemed by appellant material to this inquiry are as follows: It covers all the property of appellant wherever situated; recites that it is made "for the equal pro rata use, benefit and security" of all owners of bonds issued thereunder, "without preference or priority of one bond over an-

other, by reason of priority in time of issue or negotiation thereof, or otherwise"; provides that in case of default in interest payment the holders of a majority in amount of the bonds may, by an instrument in writing, notify the trustee of such default and declare the principal and all said bonds due and payable and request the trustee to proceed under the trust deed "for the collection of the principal and interest of said bonds"; that the trustee might forthwith demand and take possession of all the property conveyed, and as the attorney in fact or agent of appellant, or in his own name, as trustee, have, hold, use, manage, operate and enjoy the same, with other provisions as to method of management, and that the trustee shall apply the net income without preference, priority or distinction of one bond over another, ratably and equally to the payment of the principal and interest of said bond; that the trustee with or without entering into possession of said property, as aforesaid, "may proceed to protect and enforce the rights of all of the said bondholders under these presents by appropriate suit or suits in equity or at law" as it might be advised, with other provisions for a receiver, etc. It is provided: "That no holder or holders of any of said bonds or coupons shall have the right to institute any proceedings of whatever character or kind for the foreclosure of this indenture, or the execution of the trusts hereof, or for the appointment of a receiver, or for any other remedy under this trust deed, without first giving notice in writing to the said trustee," etc. (No such notice was given.) Then follows provisions as to indemnity to be furnished the trustee, and manner of procedure; and further provided: "That neither the said trustee nor the holder or holders of any of said bonds, or any of the said interest coupons intended to be hereby secured, shall institute any suit, action or proceeding for the foreclosure thereof, or for the appointment of a

receiver otherwise than upon the terms and conditions and in the manner herein provided."

These are all the provisions relied on by appellant in support of its claim of stipulations in the trust deed barring these suits at law. There is nothing in the trust deed that expressly forbids the holders of coupons to bring actions at law thereon. We think the law is correctly stated in Jones Corporate Bonds, section 340, quoted in 49 L. R. A. (N. S.), page 160, as follows:

"The fact that a railroad mortgage empowers the trustees, upon the written request of the holders of bonds to a specified amount, after breach of the condition, to sell the property is no defense to a suit at law upon the bonds or coupons after they are payable. The bonds are the principal debt, and the mortgage is only an incidental security. The remedies at law and in equity do not clash and destroy each other, but exist together. * * * The mortgage might positively, or perhaps impliedly, take away from the bondholder his right of action at law upon the bonds or coupons; but the common-law right to enforce these obligations remains if not so taken away."

Many other authorities on the subject are collected in the note to L. R. A. above referred to. The trust deed under consideration in the present case does not expressly take away the right of action at law on these bonds. The only question is whether it impliedly takes it away. We do not decide that it might be taken away by implication. An examination of the authorities leaves that question at least doubtful; but even if it could be, there is no such implication in the trust deed under consideration except that arising from the evident intention that all the bondholders should share equally in the proceeds of appellant's property if it became necessary to enforce payment by resorting to the trust deed. This implication, as will be seen by a reference to the authorities cited in the note to L. R. A. above mentioned, does not bar a suit at law on the coupons. Whether it prevents a collection of a judg-

ment obtained in such suit at law by levy on and sale of property covered by the trust deed, is a question not now before us. It would seem from the published abstract of the opinion that the Appellate Court of the First District reached the conclusion here expressed in the case of *Kellogg v. Interstate Independent Tel. & Tel. Co.*, 190 Ill. App. 187. Each of the three judgments is affirmed.

Affirmed.

R. B. Stoddard, Appellant, v. Daniel Keefe, Francis O'Neil and Walter Cooney, Drainage Commissioners of Drainage District No. 1 of Town of Hahneman, County of Whiteside, and State of Illinois, Appellees.

Gen. No. 6,291.

1. DRAINAGE, § 91*—*when feasibility of improvement of drainage ditch question of fact.* In a mandamus suit to compel drainage commissioners to so improve a drainage ditch as to prevent overflow on petitioner's land, the feasibility of so doing *held* to be a question of fact for the trial court.

2. DRAINAGE, § 87*—*what is duty of drainage commissioners in construction of ditches.* While drainage commissioners are charged with the duty to furnish a sufficient channel for a drainage ditch, if it can be reasonably done, they are not required to expend large sums of money on schemes or experiments of doubtful benefit or utility.

3. DRAINAGE, § 90*—*when mandamus will not lie to compel drainage commissioners to make improvements.* A proposed improvement of a drainage ditch, *held* to be of such doubtful utility and effectiveness to prevent overflows as to justify the denial of a writ of mandamus to compel drainage commissioners to make such improvement.

4. DRAINAGE, § 101*—*what does not constitute taking or damaging land.* Allowing surface waters to drain upon lower lands or causing such water, which would otherwise evaporate or seep

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

through the soil, to be precipitated upon lower lands by artificial drainage, is not taking or damaging land, though without compensation made, in violation of the State constitution.

5. DRAINAGE, § 91*—*when proposition of law on duties of drainage commissioners correct.* Propositions of law as to duties of drainage commissioners in determining upon a system of drainage; to keep ditches in repair; to remedy errors in location and construction of ditches; and to furnish an outlet sufficient to meet changing conditions in flow of water, *held* correct.

6. DRAINAGE, § 91*—*when propositions of law as to duties of drainage commissioners in enlarging ditch properly modified.* Insertion of the phrase "so far as practicable" in holdings of propositions of law as to the duties of drainage commissioners to enlarge a ditch, sufficient when constructed, so as to take care of additional flow of water into it resulting from ditches subsequently constructed in other districts, or from the construction of additional laterals and more extensive use of tile, *held* correct.

7. DRAINAGE, § 87*—*what not duty of commissioners in altering construction of ditch.* It is not the duty of drainage commissioners to so alter the construction of a ditch as to prevent the overflow of water on a landowner's land, regardless of cost, since lands in a district cannot be assessed for a sum greater than the benefits derived from an improvement.

8. DRAINAGE, § 91*—*when action for writ of mandamus to compel drainage commissioners to remedy defective conditions in ditch accrues.* To entitle a landowner to a writ of mandamus to compel drainage commissioners to remedy defective conditions in a ditch, demand must be made within a reasonable time after the condition complained of arises, and suit brought within five years after such demand.

9. DRAINAGE, § 91*—*when statute does not run against right to bring mandamus to compel drainage commissioners to remedy defective conditions in ditch.* So long as a landowner does not know the cause of the insufficiency of a drainage ditch and is diligent in seeking the cause thereof, the statute of limitations does not begin to run against a right to bring a mandamus suit to compel the commissioners to remedy such condition.

10. DRAINAGE, § 91*—*when statute not bar to mandamus suit to compel commissioners to repair ditch.* If the insufficiency of a drainage ditch is due to failure to keep it in repair, the statute of limitations is no bar to a mandamus suit to compel the commissioners to remedy such condition.

11. DRAINAGE, § 90*—*when commissioners may be compelled to remedy defective conditions in drainage ditch.* It is not a defense

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

to a mandamus suit, to compel drainage commissioners to remedy defective conditions of a ditch, that lands in the district other than those of the petitioner are sufficiently drained and will not be benefited by the improvement sought by the petitioner.

12. DRAINAGE, § 87*—*when commissioners no right to spill water from ditch.* Drainage commissioners have no right to collect waters from lands distant from their district, convey them in artificial channels and spill them in large quantities upon lands in their district out of the natural course of their drainage.

13. DRAINAGE, § 91*—*when petition for writ of mandamus properly dismissed.* A petition for writ of mandamus to compel drainage commissioners to remedy a defective condition in a ditch, *held* properly dismissed where such condition existed more than five years before filing of the petition, and, if the petitioner did not know of it before such period, it was so obvious that he should have known of it.

14. MANDAMUS, § 6*—*when lies.* Mandamus lies only where there is a clear legal right to have an act performed which it is the defendants' duty to perform in the manner asked.

Appeal from the Circuit Court of Whiteside county; the Hon. FRANK D. RAMSAY, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

M. A. STIVER and CLYDE SMITH, for appellant.

CARL E. SHELDON, for appellees.

MR. JUSTICE CARNES delivered the opinion of the court.

This is an appeal from a judgment rendered against the petitioner, R. B. Stoddard, in a mandamus suit prosecuted by him against appellees, as commissioners of a drainage district organized under our Farm Drainage Act, to compel them to widen, straighten, deepen and repair their main ditch from the right of way of the C. B. & Q. R. R. Co., to its outlet in Green River, about two and one-fourth miles, so as to prevent overflow and damage to appellant's half section of farm land abutting that part of the ditch. The case

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

was tried by the court without a jury on pleadings, stipulations and evidence, presenting the questions: (1) Whether the part of the ditch sought to be improved is now reasonably sufficient for the purpose for which it is used? (2) Whether appellant's land has been damaged by overflow because of an insufficiency of that part of the ditch? (3) Whether, if that part of the ditch is insufficient, it can reasonably be enlarged and its present banks raised in the manner demanded by appellant? (4) If the above three questions are answered in the affirmative, whether appellant is barred by the statute of limitations or by laches from demanding in this proceeding the relief sought?

The controlling questions are of fact, upon which the court heard much testimony. It appeared that prior to 1881 there was about 25,000 acres of land near Green River that was for a large part uncultivatable because of swamps and ponds, and therefore of little value; that it was capable of drainage into Green River by artificial means through large open ditches which would furnish outlets for tiling (we understand that the water on this land accumulated from surface drainage with a natural outlet, so far as it had an outlet, into Green River); that in 1881 appellees' farm drainage district embracing about 7,000 acres near the river was organized, including all of sec. 32, T. 19 N., R. 7, in Whiteside county, Illinois, the east half of which section is now owned by appellant; that some work was done with teams and scrapers at about that time to construct a channel that would somewhat confine surface water in its course over that territory to the river; that afterwards in 1885 a classification of the lands in this district for the purpose of assessments for improved drainage was made, in which classification the east half of said section was set down at 90 and the west half at 70; 100 would indicate the highest assessment per acre to be made in the district. The scale of classification of all the lands ranged from 5 to

100, therefore we suppose the east half of section 32 was mostly unfit for cultivation and was presumed to be greatly benefited by the proposed improvement, though not necessarily all of it, even when tiled into the drainage ditch, fit to raise a corn crop in a wet season. One Phebe Carter then owned the whole section and paid her assessment. A ditch with a twenty-five foot bottom down to sand was constructed from the upper part of the district to its southern boundary at the south line of said section 32, and thence south about half a mile to Green River. It extended along the entire east line of said section 32. At about this time three other drainage districts were formed embracing the rest of said 25,000 acres of wet lands, and contracts were made between the commissioners of appellees' district and the commissioners of said other districts respectively, permitting connection with the main channel of appellees' district. Before 1899, the last of these improvements was completed and the entire water from the whole territory was discharging through this main channel of appellees' district from artificial drains the same as now, except no doubt from time to time the flow of water was affected by different owners of land in the various districts tiling into the open ditches.

In the part of the ditch here sought to be improved the volume of water is, and all the time has been, at times so large that reliance must be placed on the banks elevated by the deposit of soil in excavating the ditch to confine it to the artificial channel. Appellant bought all of said section 32 in 1899, and sold the west half of it in 1912. In August, 1914, he served notice on appellees that the main ditch from the right of way of the railroad south to its outlet is not of sufficient width, depth and capacity to furnish ample and sufficient drainage to his land and other tributary lands, and to prevent wash and overflow, and that he therefore demands that appellees proceed to deepen, widen

and straighten the ditch and make sufficient banks thereto so that it will be of sufficient width, depth and capacity to furnish the necessary outlet to drain petitioner's lands and other tributary lands, and prevent wash and overflow. Appellees, failing to comply with this demand, this suit was commenced to the April term, 1915, of the Circuit Court of Whiteside county. The petition filed prayed that appellees be compelled to make the improvement, using language substantially the same as used in the demand. Answers were filed, among other defenses setting up the statute of limitations, but the case was tried on a stipulation that all evidence might be received which would have been competent and admissible upon proper pleadings either on the part of the petitioner or respondents. It was not sought on the hearing to compel any improvement substantially other or different from that designated in the demand, and the argument here rests on the proposition that substantially that improvement should be ordered by the writ of mandamus.

It is clear that appellant's farm has been benefited by the improvement and become valuable farm land, but that crops grown on a portion thereof are subject to damage from floods in extremely wet seasons, especially corn crops. He testified that during the fifteen years that he had owned the land he had seen it overflowed three times, and had seen the effects of overflow probably six or eight times. (He does not reside on the farm.) Another witness testified that it overflowed at some time during the year about eight times in the last ten years. Some of these times were in the early spring when most of such lands overflowed without damage. In 1915, after this suit was begun but before the trial, the tenant on the place lost from flood a considerable portion of his corn crop. In the present condition of drainage an extreme wet season will be unfavorable to cropping a part of the premises. Be-

cause of such danger some considerable part may have to be devoted to pasture or hay land, which temporary floods do not so much damage. Lands of that kind are of less market value than if capable of all farm uses.

Much testimony is devoted to the real occasion of this water on appellant's land. Appellant's evidence tends to show that the main ditch is not deep enough or wide enough, and the banks are not high enough to confine the waters in extreme wet times, and that there is a break in the banks above appellant's lands where the water flows through in large quantities and down a natural depression upon his premises. Appellees' evidence tends to show that the condition of appellant's lands complained of is due to many causes: From the waters setting back from Green River in the main ditch, and failure of traps on appellant's tile drains to check the intake because they were permitted to get out of repair; that the banks of the ditch are often getting out of repair by reason of work of muskrats and other causes, and waters break through at various places. Appellees also claim that it is impossible that the water comes from an overflow at the north, as claimed by appellant. Their witnesses also testify to what is common knowledge of people living in this part of Illinois, that the summer of 1915, which is used as the most striking example of damage from floods, was an extremely wet season and that it was no uncommon occurrence that lands sufficiently drained for ordinary seasons were flooded because of the incapacity of the artificial drainage to meet the unusual demand. It is not clear just what was the occasion of damage to appellant's lands. His counsel argue, when their attention is turned to the statute of limitations and the defense of laches, that he did not know until a short time before making his demand how the trouble originated or how it could be remedied. This supports the presumption raised by other testimony that those questions are quite doubtful.

The drainage ditch cannot be reduced to a lower level than Green River, its outlet. Appellees have no control over that river. It was dredged a few years ago and their drain washed out and deepened in consequence thereof and was substantially improved, but the bottom of Green River, as well as of appellees' main ditch, is sandy. The river filled up again to about its old level and conditions now are about the same as before the dredging. Appellant introduced the testimony of a civil engineer that the part of the ditch in question was not wide enough or deep enough, and he recommended a scheme for deepening and widening it. He admitted that it could not be permanently deepened if there was a sand bottom, and said that the dykes formed by the earth thrown up at the sides of the ditch were necessary factors in controlling the overflow; that if the ditch were widened and new dykes constructed they would not for sometime be as strong as the present dykes that have healed and hardened with age and the growth of vegetation and trees. He recommended that the dyke on appellant's side of the ditch stand and the dredging be done entirely on the other side. It seems clear that this would imperil that landowner. Appellees called witnesses, some educated as civil engineers and others only experienced in matters of drainage, who testified that in their opinion, everything considered, the present ditch was capable of doing as effective work as the proposed enlarged ditch would do; that it could not be deepened because of the sand bottom and the level of Green River; that the banks were solid and could easily be kept in repair, while new banks would require much time to get in firm condition. It also appeared that the expense of the proposed enlargement would be about $12,000.

It would unduly extend this opinion to discuss in detail the conflicting evidence as to the feasibility of enlarging the ditch as demanded by appellant. It was a question of fact to be decided by the trial court after

seeing the witnesses and hearing them testify. Appellees are charged with a duty to furnish a sufficient channel, if it can reasonably be done. They are not required to expend large sums of money on some scheme of very doubtful benefit. The court in this proceeding was not authorized to compel a costly improvement that the evidence shows was an experiment quite as likely to result in no benefit as otherwise.

As we read the evidence it shows that the part of the ditch in question is not now sufficient to perfectly answer the purpose for which it is used; that appellant's land has been damaged by overflow of water that could have been prevented by an ideal ditch; that it is impossible to construct an ideal ditch that will protect appellant's lands and other lands similarly situated because of the high level of the Green River bottom and of the sand subsoil under appellees' ditch; that whether the ditch remains at its present width, or is increased to a greater width, there will troubles arise from time to time from breaking of the banks in high water, either from above or backing up from below, and that such troubles will have to be constantly guarded by the drainage commissioners and the owners of lands subject to overflow; that the change demanded by appellant is in the nature of an experiment of very doubtful utility and therefore that appellees were justified in refusing to make it, and much less would the court have been authorized in this mandamus proceeding to compel it.

Appellant urges that casting water upon one's premises is a taking or damaging of property, and, if without compensation, is in violation of our constitution, citing cases where properties have been so wrongfully damaged, and says that the water complained of here is not from surface drainage of the 7,000 acres of land within the district, but comes from other lands. We do not see much application of this argument to the facts of this case. As before said, we suppose it is all

a matter of surface drainage and not a question of disposing of waters that come from subterranean lakes and streams. Owners of lower lands are subject without redress to damage from surface drainage of higher lands owned by others, even though waters are precipitated upon the lower lands by artificial drainage that would otherwise evaporate or seep through the soil. This principle was established in the case of *Peck v. Herrington,* 109 Ill. 611, and has been repeatedly reaffirmed in later Illinois cases citing that case.

The court, at the instance of appellant, held as law as follows except by the insertion of the phrase, "So far as practicable," which in the following statement we have inclosed with brackets, that: "It is the duty of drainage commissioners to determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies as well as the present," and "to keep the ditches of the district in repair," and: "If it shall be found that by reason of error in the location or construction of the ditches, or any of them, or from any other causes, the lands of the district are not drained or protected as contemplated, or some of them receive partial or no benefit, it is the duty of the commissioners to use the corporate funds of the district to carry out the original purpose to the end that all the lands so far as practicable shall receive their proper and equal benefits as contemplated when the lands were classified." That if when defendants' district was first established its outlet was of sufficient capacity for the then demand, and afterwards ditches of great length and capacity of other drainage districts were permitted to empty into defendants' ditch and thereby burden it beyond its capacity, it would be the duty of defendant commissioners "to correct said insufficiency [as far as practicable] and furnish an outlet or outlets of sufficient capacity for the increased

volume of water carried into it"; that "if the demands upon the outlet of a drainage district continue to grow and its relative capacity continues to diminish, the obligation of the commissioners to furnish an outlet of sufficient capacity correspondingly continues"; that if the outlet was originally of ample capacity, still, if the demands upon it either because of other lands being drained into it by other drainage ditches, or by more minute drainage into existing ditches, as for instance by more extensive use of tile or additional laterals, so increased as that it becomes insufficient, the duty to furnish an outlet of ample capacity continues and requires the commissioners to improve such ditch so as to fulfil that duty. [So far as practicable.]

On the question of the statute of limitations and laches, the court refused to hold for appellant that a cause of action to petition for mandamus did not accrue until a demand had been made upon respondents to perform the duty which is the object of the mandamus suit, and that the petitioner was not required to make such demand until he had notice of the facts upon which this duty is based, and that he has in law five years within which to make a demand after notice of the default, or that he has a reasonable time within which to make a demand after he has notice of the conditions which he seeks to have remedied through his mandamus suit, and substituted the proposition that "Demand must be made within a reasonable time after the condition complained of arises, and suit brought within five years after such demand." The court held appellant's propositions that if the outlet in question was gradually becoming insufficient and the petitioner and respondents did not know the cause, but were reasonably diligent in seeking to find the cause, but failed to do so, then so long as this was the fact the statute of limitations would not run against this mandamus suit; that "If the alleged insufficiency of the outlet is due to

a failure to keep the same in repair, the statute of limitations is not a bar to this action"; that "It is not a good defense to this petition that other lands in the district are sufficiently drained and will not be benefited by the improvement sought by petitioner"; that the defendant district "has no legal right to collect waters from lands miles away and convey them in artificial channels and spill them in large quantities upon petitioner's lands *out of the natural course of their drainage.*"

The court held the law fixing appellees' duty as claimed by appellant with the exception of holding that appellees were only required to act "so far as practicable." Appellant argues that the question of practicability does not enter into the case; for instance, that the court should not have concerned itself with the question of cost; that there was an imperative duty on the defendant commissioners regardless of feasibility, practicability, or costs. We do not take this view of the law. The commissioners certainly could not have assessed the lands of the district for a greater sum than the entire benefit to the district because it could assess no landowner in excess of the benefits to his lands. (*People v. Chicago & I. Traction Co.*, 267 Ill. 510; *Drainage District No. One v. Dowd*, 132 Ill. App. 499, 506.) We have no occasion to determine here the law as to appellees' duties as held by the court other than as just stated, but we think on the authority of *Latham v. Holland*, 133 Ill. App. 144; *Peotone & M. U. Drain. Dist. v. Adams*, 163 Ill. 428; *People v. Henry*, 236 Ill. 124, the holding was correct on that question, as well as to the propositions asked by appellant as the one to which he objects.

We are of the opinion also that the court correctly held the law on the question of the statute of limitations and laches (*Meents v. Reynolds*, 62 Ill. App. 17, 23) where this court said, citing authorities: "There is as much need for the application of the statute of

repose in this class of cases as in others." These holdings of law do not enable us to determine on which ground the court dismissed the petition. We think the record fairly shows that the present condition complained of is not substantially different from what it was in 1899 when appellant purchased the land. If the ditch is obviously too small, it was then so, and if it is reasonably certain it should be remedied in the way petitioner demands, it should have been then so remedied; and if the defendant did not know of the trouble more than five years before beginning this action, he should have known of it if it was certain and obvious, as he now claims; and if the court adopted his view of the damage, its cause and its remedy, he might well have held him barred by the statute of limitations or laches. If, on the other hand, the court took the view of the facts that we have hereinbefore expressed, the petition was properly dismissed without regard to the question of laches.

It is settled, oft-repeated law that mandamus lies only where there is a clear legal right to have an act performed; an act that it is the defendant's duty to perform. It does not lie in a doubtful case. The relator must show a clear legal right to have the thing sought by it done, and in the manner asked. (*Swigert v. County of Hamilton*, 130 Ill. 538, 549; *Chicago & E. I. R. Co. v. People*, 222 Ill. 396; *McGann v. People*, 194 Ill. 526.) We find no error in the record, therefore the judgment is affirmed.

Affirmed.

Fred Pierce, Appellee, v. Village of North Utica, Appellant.

Gen. No. 6,294. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

Statement of the Case.

Action by Fred Pierce, plaintiff, against Village of North Utica, defendant, on a contract for services. From a judgment for plaintiff, defendant appeals.

The defendant contracted to pay the plaintiff three dollars a day to take charge of one afflicted with smallpox, who was confined in a house in the village.

The house was quarantined and a police officer brought food to plaintiff and the patient. The plaintiff took charge of the food and remained in the house, making sure of the desired end that no one should be permitted to come in contact with the sick man.

MELVILLE W. CLARK, for appellant.

W. A. PANNECK, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL CORPORATIONS, § 158*—*when power to make contract for nursing.* A village has the power to make a valid contract with one to act as attendant upon a smallpox patient and to make his quarantine effective.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henry G. Heren, Appellee, v. Illinois Central Railroad Company and Peoria & Pekin Union Railway Company, Appellants.

Gen. No. 6,298. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

Statement of the Case.

Action by Henry G. Heren, plaintiff, against the Illinois Central Railroad Company and the Peoria & Pekin Union Railway Company, defendants, for personal injuries sustained by being struck by a locomotive. From a judgment for plaintiff, defendants appeal.

STEVENS, MILLER & ELLIOTT, for appellants; JOHN G. DRENNAN, of counsel.

WEIL & BARTLEY, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

MASTER AND SERVANT, § 683*—*when evidence insufficient in action by railroad employee for personal injuries.* In an action by a section man for injuries sustained by being struck by a locomotive in a switch yard, where he testified that as he was crossing a track seven feet in front of a standing engine it suddenly started without warning and ran into him, and the engineer, fireman and head brakeman, all on the engine, testified that the plaintiff attempted to cross the track, without looking, thirty-five feet in front of the engine, which was moving six to eight miles an hour, and that the bell was ringing and whistle was blown, a verdict for the plaintiff *held* to be so manifestly against the weight of the evidence as to require a reversal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Finley Barrell, Appellant, v. Lake Forest Water Company, Appellee.

Gen. No. 6,302. (Not to be reported in full.)

Appeal from the Circuit Court of Lake county; the Hon. CLAIRE E. EDWARDS, Judge, presiding. Heard in this court at the April term, 1916. Reversed. Opinion filed August 10, 1916.

Statement of the Case.

Bill by Finley Barrell, complainant, against Lake Forest Water Company, a public service corporation, defendant, to restrain it from shutting off the water on complainant's premises because of his failure and refusal to pay a bill rendered for water furnished in the months of July, August and September, 1913, alleged to greatly exceed the amount he had used in that period. From an order dissolving a temporary injunction, complainant appeals.

There was a prior hearing on a motion to dissolve this same injunction, in which the motion was allowed and appeal to this court by the water company. The order overruling the motion to dissolve was reversed and the court remanded the cause for another hearing on that motion. The opinion was reported (not in full) in 191 Ill. App. 269.

On reinstatement of the case, other affidavits were read covering the suggestions found in the opinion, and indicating a sharp controversy as to many material facts. The question before the trial court on this motion was whether the *status quo* should be maintained pending a final hearing.

FREDERICK SASS and A. F. BEAUBIEN, for appellant.

COOKE, POPE & POPE, for appellee.

MR. JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 273*—*when temporary injunction dissolved.* Whether a temporary injunction should be dissolved or remain in force depends upon the evidence produced at the hearing of a motion to dissolve such injunction.

2. INJUNCTION, § 269*—*what is nature of hearing of motion to dissolve temporary injunction.* A hearing of a motion to dissolve a temporary injunction is not a hearing on the merits.

3. INJUNCTION, § 154*—*when status quo preserved.* Whether the *status quo* should be preserved by the continuance of a temporary injunction depends not only upon the probability of the case made on a hearing to dissolve such injunction, but also upon the relative injury that might be sustained by the parties, by the action of the chancellor in granting or refusing the motion contrary to what might be found on a final hearing to be the merits of the case.

4. INJUNCTION, § 154*—*when preliminary injunction not dissolved.* A preliminary injunction against the interference with the water supply of a customer of a water supply company because of the failure to pay bills will not be dissolved where a hearing on the merits is necessary under the bill, answer and affidavits in support and denial of the motion, as the continuance of the injunction would simply preserve the *status quo*, and the loss which the water company would sustain if the injunction was continued, would be small compared with that of the consumer if his water supply was cut off pending the hearing on the merits.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Frank Barney, Plaintiff in Error.

Gen. No. 6,226.

1. INTOXICATING LIQUORS, § 149*—*when evidence sufficient to connect defendant with offense.* On a prosecution for selling intoxicating liquors in anti-saloon territory, evidence *held* sufficient to connect defendant with the offense.

2. INTOXICATING LIQUORS, § 130*—*when presumed that beer is intoxicating.* It will be presumed that beer sold at a place where intoxicating liquors are sold is intoxicating liquor.

3. INTOXICATING LIQUORS, § 151*—*when evidence sufficient to sustain conviction for sale of.* On a prosecution for selling intoxicating liquors in anti-saloon territory, evidence *held* sufficient to sustain a conviction.

4. INTOXICATING LIQUORS—*when immaterial whether officer could close common hall to premises under judgment.* Where a person is charged with selling liquor in anti-saloon territory at a place known as "129 North State street," which is a building with a common hall dividing the part used by defendant and that used by another person, if the keeping and selling of liquor by the defendant is abated it is immaterial whether the officer could close the hall under the judgment.

5. CRIMINAL LAW, § 624*—*what place defendant may not be sentenced to in order to work out fine.* A convicted person may not be sentenced to a "county poor farm" to work out a fine under Hurd's Rev. St., ch. 38, ¶ 168b (J. & A. ¶ 3795).

6. INTOXICATING LIQUORS, § 259*—*when judgment of conviction for selling intoxicating liquor sustained in part.* On conviction of a person for selling liquor in anti-saloon territory, *held* that although the judgment was invalid and must be reversed in so far as it related to working out the fine, if not paid, on a "county poor farm," it was otherwise valid and should be affirmed.

Error to the County Court of Boone county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in this court at the April term, 1916. Reversed in part and affirmed in part. Opinion filed August 10, 1916.

WILLIAM L. PIERCE and ALEXANDER J. STROM, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

PATRICK H. O'DONNELL, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

An information containing twenty-nine counts was filed in the court below against Frank Barney, twenty-eight of which charged him with selling liquor in anti-saloon territory, and the twenty-ninth with keeping a room on the east side of North State street, in the City of Belvidere, generally known as No. 129 North State street, which was a place of public resort where intoxicating liquors were then and there sold, in violation of the act concerning anti-saloon territory, and which place was therefore a common nuisance. He was found guilty on the first eight counts and on the twenty-ninth count of said information, and was sentenced to fine and imprisonment under each count, and there was a judgment abating the nuisance under the twenty-ninth count. Barney prosecutes this writ of error to review said judgment.

Barney occupied the second floor of a place known as No. 129 North State street. The second story contained two apartments opposite each other, with a hall in the middle, and there was access to the hall from the ground by stairways both in the front and in the rear. It seems that Barney lived there and conducted an ice business in the city. Many witnesses went up either the front or the back way and went into this hall, and they were there met by Barney or some other person from his rooms and asked what they wanted, and they were sold beer and whisky and the same was usually, but not always, brought out and delivered to them in the hall, and this was in a remote part of the City of Belvidere, and it was at that time anti-saloon territory. It is contended that most of the witnesses used the word "Barney" only, and did not say "Frank Barney," and may therefore have meant some other person than the defendant. It was proved by one or more

witnesses that this was the place of business of Frank Barney, and that Frank Barney was in that place and in the adjoining hall. Thereafter many witnesses spoke of him as Barney. There was no suggestion that any other man of that name except Frank Barney was involved in the inquiry. We have no doubt that the jury correctly understood the witnesses to refer to the defendant, Frank Barney. It is contended that many of the sales were proven to have been of beer, without any statement that it was lager beer or a malt liquor. It was held in *Hall v. People,* 134 Ill. App. 559, that the word "beer" when employed in connection with sales in a place where intoxicating liquors are usually sold means an intoxicating drink, and that is based upon *Myers v. State,* 93 Ind. 251. See also, *Welsh v. State* (Ind.), 9 L. R. A. 664. There was proof of numerous sales of whiskey in this place, and at least at eight different times, and under the rule just cited it will be presumed that the beer was also intoxicating. There were proofs not only of sale and delivery from Barney's room and in that hall of beer and whisky by Barney himself, but there was also proof of sales by Miss Stover, Miss Ballard and Miss Walls in Barney's absence, and it was insisted that as this was not a regular saloon there could be no presumption that these women were his agents or servants, or that he was bound by their sales. There was proof of sales by at least two of these women and delivery of liquor by them when Barney was there, and we do not doubt that they were sufficiently shown to be persons for whose acts he was responsible. It may be doubted whether, under the evidence, this was not really a saloon. In the room first reached from the hall were two large ice chests and beer cases piled about the wall, and from that room bottles of beer and bottles of whisky were brought whenever called for, and some were sold and delivered in that room, and it possessed many of the qualities of an ordinary sa-

loon, and was called by several witnesses Barney's place of business. There were enough sales of whisky and beer proven to have been made in that hall and in Barney's room to justify a conviction under each of the counts under which Barney was convicted, and of numerous other sales of whisky and beer, and the verdict is amply sustained by the evidence. It is insisted that the hall could not be abated under the last count because not described therein, and also because the people living on the other side of the building on that story were entitled to the joint use thereof. If the keeping and selling of whisky and beer within Barney's rooms, which are strictly and unquestionably 129 North State street, is abated, there is no danger that any beer or whisky will be sold or delivered in the adjacent hall, and the question whether an officer could close the hall under this judgment is immaterial.

In the judgment it was also provided that if defendant did not pay the fine and costs thereon after the expiration of his sentence of imprisonment, he "be required to work out said fine at the county poor farm, situated in the County of Boone, in said State, at the rate of $1.50 per day for each day's work, pursuant to the statute in such case made and provided." Paragraph 168b of the Criminal Code, Hurd's Rev. St. 1913, page 839 (J. & A. ¶ 3795), provides that any person convicted of petit larceny or any misdemeanor punishable under the laws of this State in whole or in part by fine may be required to work out such fine and all costs in the workhouse of the city, town or county, or in the streets and alleys of any city or town, or on the public roads of the county, under the proper person in charge of such workhouse, streets, alleys or public roads, at the rate of $1.50 per day for each day's work. The next section contains directions for the keeper of a workhouse, street commissioner, city marshal, supervisor of roads, or person in whose keeping such convicted person shall be placed. The fourth paragraph

of section 25 of chapter 34 of the Revised Statutes relating to counties (Cal. Ill. St. Supp. 1916, ¶ 2769) gives the county boards of the several counties power to cause to be provided a suitable workhouse in which persons convicted of offenses punishable by imprisonment in the county jail may be confined and employed, and to make rules and regulations for the management thereof. The court therefore had power to sentence this defendant to work out his fine (if the same was not paid) in a city workhouse, a town workhouse, a county workhouse, or on the streets or alleys or on public roads, under a proper person in charge thereof. We are of opinion that this does not authorize sentencing the defendant to work out his fine on the county poor farm, which, in and of itself, is not a building nor a place named in the statute. If in Boone county the county board had established a county workhouse at the poor farm, this defendant could have been sentenced to work out his fine in that workhouse; but then it should have been designated as the county workhouse, and would mean to work out his fine in or about the building designated as the county workhouse, and not to work it out upon the farm. The Legislature could have designated the county poor farm as a place where such a fine could be worked out, but did not do so. If this judgment had sentenced him to work out the fine in the county workhouse, it would have been assumed that there was such a place in the county, and no controversy on that subject would arise unless and until the sheriff was unable to deliver him at such a workhouse, because there was none established by law. In our opinion that part of the judgment which relates to the working out of the fine is invalid and must be reversed, but that portion of the judgment can be reversed without in any way affecting the validity of the rest of the judgment, under each count of which defendant stands convicted.

The judgment is therefore reversed so far as it provides for working out the fine on the county poor farm, and in all other respects it is affirmed.

Reversed in part and affirmed in part.

The People of the State of Illinois, Defendant in Error, v. George P. Powers, Plaintiff in Error.

Gen. No. 6,227.

1. APPEAL AND ERROR, § 963*—*how record may not be impeached.* The record of the trial court imparts verity and may not be impeached by affidavits on appeal.

2. APPEAL AND ERROR, § 930*—*when record may be amended.* Where a record filed is incorrect, or omits necessary matter supposed to have occurred in the trial court, the record can only be corrected by application to the court below in term time, and the trial court has jurisdiction to hear and determine the matter at a later term, if there exists anything to amend the record by.

3. APPEAL AND ERROR, § 1345*—*when presumed that bill of exceptions presented to trial judge before expiration of judgment term.* It will be presumed that a bill of exceptions signed by a trial judge after the expiration of the judgment term was presented to him before the expiration of such term, where there is nothing in the record on appeal to show when it was presented to him and he did not follow the customary practice of indorsing upon the bill the fact and date of its presentation to him for signature.

4. APPEAL AND ERROR, § 831*—*when bill of exceptions may be presented to trial judge.* A bill of exceptions may be presented to the trial judge at any time during the term at which the judgment was rendered without any previous order permitting the same to be so presented and filed.

5. APPEAL AND ERROR, § 839*—*when right to file bill of exceptions expires.* If a bill of exceptions is not presented during the term and no order is granted fixing the time for its presentation beyond the term, the right to file such a bill of exceptions expires with the term.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

6. APPEAL AND ERROR, § 846*—*when judge may receive and sign bill of exceptions after term.* Where a bill of exceptions is not presented within the term, the judge may not thereafter receive and sign such a bill except by consent of parties, and the order of the court, by such consent, in term time extending the time.

7. INTOXICATING LIQUORS, § 151*—*when evidence insufficient to show that defendant keeper of place where liquors sold.* On a prosecution for the sale of intoxicating liquor, where it appeared that defendant had sold the premises in which it was alleged that the liquor was sold to his wife, and that the premises had been rented to another person to be used for the sale of soft drinks, but that defendant had a desk in the front part of a room on the premises, evidence *held* insufficient to establish that defendant was the keeper of a place in which intoxicating liquors were sold, so as to authorize its abatement as a nuisance.

8. CRIMINAL LAW, § 594*—*when judgment reversed as a whole.* A judgment of conviction for selling intoxicating liquor in anti-saloon territory under one count and of being the keeper of a place which is a nuisance under another count must be reversed as a whole, where the defendant is not guilty under the latter count.

Error to the County Court of Boone county; the Hon. WILLIAM C. DEWOLF, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

WILLIAM L. PIERCE and ALEXANDER J. STROM, for plaintiff in error.

PATRICK H. O'DONNELL, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

George P. Powers was convicted under the first count of an information charging him with the sale of intoxicating liquor in violation of the anti-saloon territory act (J. & A. ¶ 4637 *et seq.*), and under the eighth count charging him with being a keeper of a place which was a nuisance under the same act. He was sentenced to imprisonment and a fine under each count and there was a judgment for the abatement of the al-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

leged nuisance. He has sued out this writ of error to review said judgment.

In this court the State's Attorney entered a motion to strike the bill of exceptions from the record, and accompanied said motion by a supplemental record, duly certified, showing the order for the adjournment of the term at which said conviction was had in the court below. We took that motion with the case. Defendant in error filed affidavits setting up his version of the facts in the court below concerning the presentation and signing of said bill of exceptions. The State's Attorney moved to strike said affidavits from the files and we took that motion with the case. The State's Attorney then filed counter-affidavits tending to show an entirely different state of facts concerning the presentation and signing of said bill of exceptions in the court below. We have, therefore, to determine: (1) Whether the affidavits shall or shall not be considered here; and (2) whether the bill of exceptions shall be stricken from the files.

By many decisions it has been settled that in a reviewing tribunal in this State the record of the court below imports verity and cannot be contradicted by affidavits, nor can any deficiency therein be supplied by affidavits filed in such reviewing court. If the record filed is incorrect, or omits necessary matter supposed to have occurred in the court below, the record can only be corrected by an application to the court below in term time, and the court below has jurisdiction to hear and determine the matter at a later term, if there exists anything in the record to amend by. These rules are stated and applied in *Wilder v. House*, 40 Ill. 92; *People v. Jameson*, 40 Ill. 93; *Herrington v. McCollum*, 73 Ill. 476; *Roche v. Beldam*, 119 Ill. 320; *Wisconsin Cent. R. Co. v. Wieczorek*, 151 Ill. 579; *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.*, 160 Ill. 288. The reason for these rules is thus stated

in *Wisconsin Cent. R. Co. v. Wieczorek, supra:* "The judgment of courts of review must always be formed upon the record, and from that alone. If they should assume to cure mistakes or omissions of the parties or counsel in the court below, by supplying matters omitted, inadvertently or otherwise, from the record, they might in like manner change the record in other respects, to the detriment of parties litigant. To do so would introduce the greatest uncertainty and confusion, be the exercise of a power with which they are not vested, and destroy the security and certainty which should inhere in judicial proceedings." It follows that the affidavits filed by the plaintiff in error, and also those filed by the State's Attorney must be stricken from the files. But this does not include the supplemental record filed by the State's Attorney, which we permit to stand.

The record is certified to contain all the orders of record in the court below in the cause in question, and the supplemental record shows when the term ended. It therefore appears from the record that the judgment in this cause was entered on December 6, 1915; that no application for leave to present a bill of exceptions or to fix a time within which a bill of exceptions might be presented was ever made to the court in this cause; that the term adjourned on December 7, 1915, and that the bill of exceptions was approved by the State's Attorney under date of December 9th, and was signed by the judge under date of December 9th, and was filed by the clerk on December 9, 1915; and the statute shows that the next term of said County Court began on the second Monday of December, 1915, which was December 13th. This bill of exceptions was therefore signed and filed in vacation. It is well settled that a bill of exceptions may be presented to the trial judge at any time during the term at which the judgment was rendered without any previous order

permitting the same to be so presented or filed; but if it is not presented during the term and no order is granted fixing the time for its presentation beyond the term, the right to present a bill of exceptions expires with the term, and if not presented within the term the judge may not thereafter receive and sign any bill of exceptions except by consent of the parties, and the order of the court, by such consent, in term time extending the time. In *Underwood v. Hossack,* 40 Ill. 98, it was held that where a trial judge had signed a bill of exceptions, the court of review would presume that he would not have done so unless it had been presented to him in proper time, and that the mere fact that it was not filed in proper time does not rebut that presumption. This was again held in *Goodrich v. Cook,* 81 Ill. 41, and in *Village of Hyde Park v. Dunham,* 85 Ill. 569. *Underwood v. Hossack, supra,* is cited with approval in *Magill v. Brown,* 98 Ill. 235; *Hawes v. People,* 129 Ill. 123; and in *Olds v. North Chicago St. R. Co.,* 165 Ill. 472, where the language of *Underwood v. Hossack* is quoted as follows: "The judge having signed the bill of exceptions, we will presume that he would not have done so, unless it had been presented to him in proper time." That case is also cited in *Conductors' Mut. Aid & Benefit Ass'n v. Leonard,* 166 Ill. 154; *Pieser v. Minkota Milling Co.,* 222 Ill. 139; *T. E. Hill Co. v. United States Fidelity & Guaranty Co.,* 250 Ill. 243; and *People v. Rosenwald,* 266 Ill. 548; though in some of these cases *Underwood v. Hossack, supra,* was treated as if it had affirmatively appeared that the bill of exceptions was presented to the judge in time. The Appellate Courts of this State have followed *Underwood v. Hossack* in holding to the presumption that the bill of exceptions was presented in apt time because the trial judge signed it. The fourth district held this in *Morrison v. People,* 52 Ill. App. 482; the first district in *Banker v. Miller,* 148 Ill. App. 182; and *Mangold v. King,* 184 Ill. App. 50; and

this court in *Yunker v. Marshall*, 65 Ill. App. 667. We have not found any case where the principle announced in *Underwood v. Hossack, supra*, has been overruled. We therefore consider it decisive in this case, and we therefore presume that this bill of exceptions was presented to the trial judge before the end of the judgment term, from the fact that he afterwards signed it, there being in the record nothing to show when it was presented to the trial judge, and he not having followed the common and approved practice of indorsing upon the bill the fact and date of its presentation to him for signature. The motion to strike the bill of exceptions from the files is therefore denied.

The proofs for the People showed that the place of business here involved, No. 423 South State street in the City of Belvidere, was formerly owned and operated as a saloon by Powers, and had a sign in front with the name of Powers upon it; that that locality became anti-saloon territory on May 7, 1914, and so remained up to the time of the filing of the information in this cause, which seems to have been October 27 or 28, 1915. Ettner, a patrolman, testified that he had seen Powers open his place of business in the mornings and close it in the evenings in May, June and July, and had seen Powers go in and take off his coat and hat and walk around there. Avery, a detective, testified that in his presence on December 22 or 23, 1914, Powers sold Youngs, another detective, a bottle of liquid, a part of which was afterwards analyzed and found to contain ninety-three per cent. alcohol. Avery also testified that on December 23, 1914, he bought a glass of cider of Powers at that place which he considered hard cider and an intoxicating liquor, although he drank it and it did not intoxicate him to the slightest extent. Peterson testified that on September 17, 1915, he bought and paid for lager beer at that place from one Sharp. Moore, a detective, testified that he and Behling, another detective, obtained whisky from

Sharp at that place on October 1, 1915, and that later that day Behling sent one Blank into this place on that business and he afterwards came out and delivered to Behling a pint of whisky. Behling testified to the same facts. He lived in Bloomington, and testified that he reached Belvidere on September 22, 1915, and left it on or about October 1, 1915, and that he saw Powers in that place of business once selling a cigar. Blank testified to the occasion of his buying a bottle and taking it outside to Moore, the detective. Johansen, a policeman, testified that he had seen Powers around that place during the year 1915 quite often, and practically every day, unless he was out of town, and he had seen Powers back of his desk or walking back and forth, and had seen him take off his coat and hat and walk back of the counter or bar, and saw him there, as a rule, from seven to six; and that on a certain Saturday in 1915 he counted the number of persons going in from 7:00 a. m. until after ten o'clock at night and counted 367 persons. He had seen probably 200 to 250 people going in on other days, and this occurred for about a year. On cross-examination he said that probably double that number had gone into a certain grocery store that came under his observation during one day. The chief of police said he had seen from 50 to 100 people per day going into that place between May 7, 1914, and October 28, 1915. The defense proved that at the time this became anti-saloon territory Powers owned the building, which was a two-story brick; that the upstairs part was unoccupied; that immediately upon its becoming anti-saloon territory he leased the premises to one Clark for a soft drink parlor, or a place where ice cream and soft drinks and cigars were sold, at a rental of $35 per month, and that he received that rent and had no connection with the business carried on in that room back of the screen, and that he never sold any intoxicating liquor there or saw any

sold or knew of any being sold after he leased the place to Clark. He testified that in the front of the building between the screen which had led to the former saloon and the front door, he had a desk and a safe and one or more chairs, and that he kept that by an arrangement with Clark as his private office. Clark had been a bartender for him when he kept the saloon. Sharp and another man worked for Clark after the latter became tenant, and Powers testified they had never worked for him. Powers testified that his principal business was the management of two race horses; that in the fore part of the season of 1915 he was training these horses at the fair grounds at Belvidere, a mile and a half distant from this office, and that he went daily to the fair ground and spent the day there except Sundays; that he kept in his office certain articles which he used in connection with the training of his horses and each morning he went there early and opened the front door, to which he had a key, and took out these articles and then left the building and went to the fair grounds, and returned again at night and left the articles in the building; and that he was not in the habit of being in the ice cream and soft drink parlor run by Clark. He testified also that he transacted certain business at that place in reference to a farm which he managed. Powers testified that in July he went with his horses to Iowa and returned to Belvidere for the fair week there the first part of September, and then went to Wisconsin and Minnesota with his horses and did not return until about the middle of October, and that he was not in Belvidere, nor within six hundred miles of there, at the time when the two witnesses above referred to testified to seeing him in that place of business. He was corroborated as to his action in the horse business and to the time he put in at the fair grounds in Belvidere, and as to the times of his absence in Iowa, Wis-

consin and Minnesota by various witnesses. He also testified that on November 24, 1914, he conveyed these premises to his wife as security for a loan she made to him of $6,000, and that the premises were then worth $8,000, and that he thereafter continued to collect the rent for her and to cause the premises to be kept in repair and bills for light and heat to be paid; that on January 19, 1915, a written lease to Clark was executed, which he signed as agent for his wife, and under which Clark thereafter continued to pay rent at $35 per month. The lease contained provisions that no intoxicating liquors should be sold there during the term of the lease, and that the tenant should be entitled to an extension of the lease unless said town became saloon territory before the 1st of May, 1916, in which case there should be no extension. Except one matter to be hereafter stated, there is no evidence that the oral lease to Clark, the deed from Powers to his wife, and the written lease by Powers as agent of his wife to Clark were not all genuine, bona fide transactions, and the rent paid from month to month as testified to by Powers, except the fact that his name was on the front of the building, that he had his office in the front between the door and partition, or screen; that he was seen there from time to time, and that two witnesses say he sold them a bottle of whisky in December, 1914; and one of these witnesses says that he bought of Powers a bottle of hard cider at about the same time. The proof was that the cigar case operated by the tenant stood between the front door and the partition, and that Powers sometimes sold a cigar therefrom when no one else was there to wait on a customer; but Powers testified that he had no authority to do that. There was no proof how many customers there would be likely to be on Saturday or any other day of the week in a place strictly devoted to ice cream, soft drinks and cigars, and the jury were not warranted in inferring from anything in the evidence that the number of per-

sons attending that place was evidence that liquor was sold there. Certainly the officer who counted the men going in all day could have taken the names of various people who went in and they could have been called as witnesses and it could have been ascertained from them whether they drank, or saw others drink, intoxicating liquor in that place, and not have left the matter to the conjecture of the jury; or, if in such a place as Belvidere, no shop of that kind which did not sell intoxicating liquor had any such patronage, that fact also could have been shown. It may be that under this evidence a conviction under the first count could be sustained on the ground that the jury and the trial judge believed the witnesses who testified that Powers sold a bottle of whisky in December, 1914; but it seems to us that the foregoing testimony does not establish that Powers was the keeper of the place and does not authorize a judgment shutting up and abating the place. The proof is all one way, that Clark is the tenant and that Sharp and another man are his clerks, and that Clark professes to run a place where he sells soft drinks, ice cream and cigars, and we feel that on this proof his business should not be destroyed by a judgment to which Clark is not a party. It is true that we held in *Grom v. People,* 135 Ill. App. 453, and *Gaul v. People,* 136 Ill. App. 445, that we could affirm a conviction under one count of such an indictment and reverse the conviction under another count, but the Supreme Court reversed the latter judgment in *People v. Gaul,* 233 Ill. 630, and held that judgments under such an information must be affirmed or reversed as to all counts. If the conviction under the last count can be sustained, it can only be because of certain answers made by Powers on recross-examination just at the close of the evidence. He was asked if on or about April 30, 1915, he said to the mayor of the city: "I own the building where I am and I don't want it closed.

I want to run it so I can sell cigars and soft drinks and I will not sell any liquor in violation of the law. If you close it up, I will get no revenue from it, but by selling cigars and soft drinks I can make $30 or $40 a month in it"; and he answered that he had a conversation something to that effect. He was then asked if he had another talk with the mayor on or about June 6, 1915, in which he said: "That you would lock up the upstairs of your building; that no liquor had been sold nor would there be any liquor sold as long as you had charge of it; that you would lock all doors going upstairs and all doors except the front door." He answered thus: "He asked me if they was selling liquor there and I told him they wasn't selling nothing at all. They was just selling soft drinks." Afterwards, he said he had a conversation something to that effect. The conversations with the mayor leading up to these statements were not given. The first one implies that he owned and was running the building. The second one, when considered with his answer, showed that he used the word "they" and not the word "I." He said "they" were not selling liquor; "they" were selling soft drinks. When this language is considered in connection with all the other evidence in the case, we do not think it warrants the abating or closing up of a place of business which the proof shows that Clark is running under a written lease and for which he regularly pays rent, since he is not a party to this suit and has had no opportunity to defend it. As we must affirm or reverse the judgment as to both counts, it is our duty to reverse the judgment and remand the cause for further proceedings.

Reversed and remanded.

J. E. Pickens, Appellee, v. City of Kankakee, Appellant.

Gen. No. 6,262. (Not to be reported in full.)

Appeal from the Circuit Court of Kankakee county; the Hon. ARTHUR W. DESELM, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by J. E. Pickens, plaintiff, against the City of Kankakee, the Kankakee Water Works and Fred Herscher, defendants, to recover for personal injuries sustained as the result of falling into a hole in the street at night and striking his leg against a water pipe and faucet in said hole. From a judgment in favor of plaintiff for $2,000 against the City of Kankakee after dismissal before trial as to defendant Kankakee Water Works and judgment for defendant Herscher on a directed verdict, defendant city appeals.

H. H. WHITTEMORE, for appellant.

C. M. CLAY BUNTAIN and T. F. DONOVAN, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 1225*—*when notice of personal injuries sufficient.* The statutory notice of personal injuries filed with the city attorney and city clerk is sufficient, although it does not contain the address of the attending physician, where such physician also holds the position of city physician and there is no other physician of the same name in the city, as it must be assumed that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the residence of such physician is known to the city officers and that by the exercise of reasonable diligence they could ascertain any fact for which resort to the attending physician was necessary.

2. EVIDENCE, § 444*—*when opinions of physician partly based on subjective symptoms competent.* Opinions of a physician founded in part upon subjective symptoms, the knowledge of which is derived by the physician during the treatment of the patient, are competent,

3. EVIDENCE, § 444*—*when medical witness may testify as to subjective symptoms.* A medical witness is not disqualified from giving his opinion founded on subjective symptoms by the mere fact that after having treated the patient for some time he became a witness in his behalf.

4. MUNICIPAL CORPORATIONS, § 1085*—*when presumed to have had notice of defect in street.* A city is presumed to have had notice of a hole in the street around an iron pipe and water faucet, three feet wide and from four to eighteen inches deep, so as to have had time to repair it where the hole has existed in substantially the same condition for more than two and a half months.

5. MUNICIPAL CORPORATIONS, § 972*—*when required to keep street in condition for pedestrians.* Where a pedestrian walking upon a street in which no sidewalk had been laid was injured by falling into a hole therein soon after reaching the portion of the street where the sidewalk began, and while actually attempting to get upon the same, it was *held* that the city should have anticipated the use of that portion of the street by pedestrians and was therefore liable for failure to exercise reasonable care to keep it in a reasonably safe condition for such use.

6. DAMAGES, § 115*—*when verdict for personal injuries not excessive.* A verdict for $2,000 in favor of a contractor for temporary injuries to his knee joint and leg, *held* not excessive.

7. INSTRUCTIONS, § 151*—*when properly refused.* Requested instructions covered by the main charge are properly refused.

8. INSTRUCTIONS, § 13*—*when properly refused.* Requested instructions which are involved are properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

A. E. Griesser, trading as A. E. Griesser Fruit & Produce Company, Defendant in Error, v. W. E. Taylor, Plaintiff in Error.

Gen. No. 6,278.

1. PROCESS, § 12*—*when summons void.* A summons issued and dated the first day of October, and returnable on the "second Monday of October next," *held* void.

2. PROCESS, § 75*—*how defect in taken advantage of.* Any defect in a writ, its service or return, which is apparent from the inspection of the record, may be taken advantage of by motion to quash the summons and dismiss the suit, and need not be raised by plea in abatement.

3. APPEAL AND ERROR, § 1802*—*when cause remanded for further proceedings.* Where a summons is improperly issued and confers no jurisdiction, the judgment should be reversed but remanded for further proceedings, especially where the fault is that of the clerk and not of the party or his attorneys.

Error to the County Court of Woodford county; the Hon. ARTHUR G. FORT, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

JOHN R. TWEDDALE and ORMAN RIDGELY, for plaintiff in error.

CLARENCE W. HEYL and HARRY C. HEYL, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

On October 1, 1915, a summons was issued by the clerk of the County Court of Woodford county returnable on the "second Monday of October next," at the suit of *Griesser v. Taylor,* and the same was duly served on that day. On October 11th, Taylor, by his attorney, entered an appearance in said cause limited to the purpose of making said motion, and moved the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

court to quash the summons and dismiss the suit for the reason that the said summons was made returnable to the October term, A. D. 1916. Said motion was heard and denied. Taylor did not appear further. There was a default and a judgment for the amount stated in the affidavit of claim. Taylor sued out this writ of error to review that judgment.

The summons was dated and issued October 1, 1915, and it was made returnable on the second Monday of October next. Taylor contends that this means October, 1916; Griessner contends that it means "the next second Monday of October, 1915," and that the word "next" does not refer to the word "October." In *Calhoun v. Webster*, 3 Ill. 221, the summons was dated November 6, 1839, and was returnable on the third Monday of November next. It was held that the writ was absolutely void. In *Rattan v. Stone*, 4 Ill. 540, where the summons was returnable on the fourth day of the term instead of the first day, it was held to be void. In *Hildreth v. Hough*, 20 Ill. 331, the summons was dated October 11, 1855, and was returnable on the fourth Monday of October next. It was held that the word "next" referred to the month and not to Monday, and that the writ was a nullity. In *Elee v. Wait*, 28 Ill. 70, the summons in chancery was dated March 2, 1860, and required the defendant to appear on the third Monday of March next. This was held to be a nullity. In *Miller v. Handy*, 40 Ill. 448, the writ there discussed was dated August 1, 1838, and was returnable on the third Monday of August next. It was held to be a nullity, and that by no rational construction could it be made good. In *Hochlander v. Hochlander*, 73 Ill. 618, the writ was dated May 8, 1872, and returnable on the third Monday of May next, and it was held that the service thereof failed to confer jurisdiction. In *Culver v. Phelps*, 130 Ill. 217, the writ there discussed was dated October 6, 1875, and was returnable on the first Monday of October next. It was held void.

The reason why such writs returnable by the terms thereof one year later or more are void is because section 1 of the Practice Act (J. & A. ¶ 8538) requires writs to be returnable on the first day of the next term, or if ten days do not intervene, then to the succeeding term, and that the plaintiff may have the summons returnable at any term of court within three months after the date thereof, and no other provision is made for the return day of a summons. Though this section 1 of the Practice Act is not in precisely the same language as former acts, yet so far as here involved, it is substantially the same. The law terms of the County Court of Woodford county are held in October, February and June, and no summons issued by the County Court of that county in October on the law side thereof could legally be made returnable in the following October.

The defendant in error argues that this question should have been raised by a plea to the jurisdiction of the court, having certain formal characteristics not found in this written motion. In *McNab v. Bennett*, 66 Ill. 157, it was held that motions to dismiss which assume the office of a plea in abatement will not be entertained unless the objection appears upon the face of the papers. In *Greer v. Young*, 120 Ill. 184, in discussing this subject, the court said the rule recognized by repeated decisions and in strict accord with the common-law practice is: "That any defect in the writ, its service or return, which is apparent from an inspection of the record, may properly be taken advantage of by motion, but where the objection is founded on extrinsic facts, the matter must be pleaded in abatement, so that an issue may be made thereon, and tried, if desired, by a jury, like any other issue of fact." In *Willard v. Zehr*, 215 Ill. 148, the same question was decided in the same way and in substantially the same language. The defect here appears from an inspection of the summons, which is a part of the rec-

ord. It therefore could be taken advantage of by motion.

It follows that the motion should have been granted and the summons should have been quashed. In some of the earlier cases above cited, it seems to be indicated that the suit should be dismissed and the plaintiff not permitted to take out another summons in the same case, but in *Ladies of the Maccabees v. Harrington*, 227 Ill. 511, where it was held that the summons had been improperly issued and that its service conferred no jurisdiction, as originally decided, the judgment was merely reversed; but upon a rehearing the cause was remanded to enable the plaintiffs to take such steps as they might desire to acquire jurisdiction of the appellant; and we are of opinion that we should follow that course here. There is additional reason for so holding. Plaintiff's attorneys filed a *præcipe* for a summons which was addressed to the proper term, and the fault seems to have been that of the clerk of the County Court and not of the plaintiff. Under section 18 of the Fees and Salaries Act (J. & A. ¶ 5619), the fees of the clerk of the County Court in counties of the class of which Woodford belongs are the same as allowed the circuit clerk, and by another provision in the same section can be collected in advance except in criminal cases; and under section 14 of said Act (J. & A. ¶ 5615), the fees of the circuit clerk for bringing such a case as this are eight dollars, and are required to be paid in advance. We may properly assume that such fee was here paid in advance by the plaintiff. He ought not to be deprived of the benefit of the payment and required to commence a new action when the fault was that of the clerk and not of the plaintiff or his attorneys. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

Jeannette E. Lewis, Administratrix, Appellant, v. New Amsterdam Casualty Company, Appellee.

Gen. No. 6,281. (Not to be reported in full.)

Appeal from the County Court of Peoria county; the Hon. CHESTER F. BARNETT, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

Statement of the Case.

Action by Jeannette E. Lewis, as administratrix of the estate of Thomas B. Lewis, deceased, plaintiff, against New Amsterdam Casualty Company, defendant, to recover on a policy of health and life insurance. For a judgment for defendant upon a directed verdict, plaintiff appeals.

A health and life insurance policy was issued by defendant to Thomas B. Lewis on June 29, 1914. Lewis was taken ill in August, 1914, and died on March 16, 1915. The policy provided for sick benefits of $25 per week. No sick benefits were paid. There was an appropriate declaration upon the policy. Certain pleas were filed, to which a demurrer was sustained, and certain other pleas were then filed upon which issue was joined. The pleas were each in bar, except as to $19.73 tender made before suit. The first plea was the qualified general issue. The remaining pleas were that the application was made a part of the policy, and that the policy was issued upon the consideration of the premium and the statements in the application, and various statements in the application as to the good health of Lewis were denied. Special replications were filed to the special pleas, and issues were joined upon said replications.

The parties lived in Peoria. George Reagan was agent of defendant at Peoria, and this policy was issued from his office upon an application brought to him

by C. K. Gerdes, who was also a life insurance agent. Lewis applied to Gerdes for health and life insurance, and Gerdes applied to Reagan. Apparently Gerdes prepared a first draft of an application and this application, which was granted, was in fact written, so far as the typewritten parts were concerned (which were the ones that it was claimed were untrue), in Reagan's office and by his stenographer, by Reagan's direction, and delivered to Gerdes. It was claimed that this application was fraudulent. Gerdes signed Lewis' name to the application. Lewis never saw it. Gerdes testified that he considered himself authorized to sign Lewis' name to it. Gerdes testified that he took the statements as to the condition of health of Lewis from applications which Lewis had made to him some years before. Gerdes denied any knowledge of the facts concerning Lewis' condition of health which tended to make this application untrue. The application was untrue. When plaintiff sought to show that Gerdes was in fact acting for defendant and had frequently acted for defendant before, the court sustained objections to the questions by which it was sought to prove the connection between Gerdes and defendant. He was allowed to state that he had acted for defendant before, but that answer was then excluded. The proof showed that Gerdes did not receive any pay from Lewis for obtaining this insurance, but that Reagan was entitled to a certain commission as between him and defendant, and that Reagan paid a part of that commission to Gerdes as his compensation for the work. Defendant introduced in evidence a letter from the superintendent of defendant to Lewis, dated February 1, 1915, notifying him that the company had canceled this policy, and that they inclosed therewith their check for $62.13, in full of the premium which Lewis had paid and interest to that date, and also a registered return receipt admitting the receipt of this letter of February 1st, which was signed "Thomas B. Lewis per G. C. Lewis." Ob-

jection was made to the competency of this evidence, and that objection was overruled. There was no proof who G. C. Lewis was, nor that he or she had any authority to sign the name of Thomas B. Lewis to that receipt nor that Thomas B. Lewis ever did receive that letter.

JOHN B. KING and LEO G. HANA, for appellant.

STEVENS, MILLER & ELLIOTT, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 639*—*when evidence erroneously excluded.* In an action on a health and life insurance policy, where the defense was that the application was fraudulent, and it appeared that the application was made out by a third person, who was a life insurance agent, from statements as to the condition of health of the applicant made years before upon making application to such third person for insurance, and it was signed by such third person without the applicant seeing it, and delivered to defendant's agent, *held* that evidence tending to show that such third person was acting for the insurance company and had frequently so acted before was erroneously excluded.

2. EVIDENCE, § 304*—*when insufficient foundation laid for admission of documentary evidence.* A letter and a registered return receipt signed for the receiver of the letter by another are inadmissible in evidence until the agency of the signer is established, or the fact that the letter did in fact reach the person for whom it was intended.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ida M. Tindall, Appellee, v. Chicago & Northwestern Railway Company, Appellant.

Gen. No. 6,288.

1. APPEAL AND ERROR, § 810*—*what bill of exceptions must contain.* Affidavits not made a part of the bill of exceptions cannot be considered on appeal though inserted in the record by the clerk and certified by him to be on file in the case.

2. APPEAL AND ERROR, § 798*—*what bill of exceptions must contain.* Error assigned on appeal on a ruling of the trial court permitting the plaintiff to amend a count in violation of an alleged agreement not to do so, made between counsel for the parties during the trial, cannot be considered where the bill of exceptions does not show that any such agreement was made or that anything was said or done in reliance thereon.

3. APPEAL AND ERROR, § 842*—*when certificate of trial judge as to facts in affidavit necessary.* Though an affidavit as to what occurred in open court during the trial of a case be embodied in the bill of exceptions on appeal as part of the showing made upon a motion for a new trial, it cannot be considered on appeal unless the facts as therein stated are vouched for by the certificate of the trial judge.

4. APPEAL AND ERROR, § 838*—*how trial judge may refresh recollection for purpose of certifying to bill of exceptions.* If a trial judge does not remember what occurred in the trial of a case before him he may, for the purpose of refreshing his recollection, have the notes of the reporter read to him, or call witnesses or jurors to testify, or receive affidavits as to such matters in order to enable him to properly certify to the bill of exceptions.

5. APPEAL AND ERROR, § 1339*—*what presumed on review of ruling denying motion for new trial.* If after the filing of an affidavit, as to matters occurring at the trial of a case, as part of the showing upon which a motion for a new trial is based, the judge denies the motion, it will be presumed, on reviewing such ruling, that he knew the statements in the affidavit were untrue, or that their effect was obviated by other things which to his knowledge occurred on such trial.

6. NEW TRIAL, § 61*—*when not granted on ground of surprise.* Where on appeal a defendant claimed that, as a result of the trial court permitting the plaintiff to amend a count in her declaration, he was taken by surprise, but it appeared that he had made no

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

request to the trial court for time to secure other witnesses nor asked for a continuance, and the matter set out in the amended count had already been thoroughly gone into, and an affidavit relied upon as the basis for a motion for a new trial did not state that the defendant had found any witnesses whom it would or could have produced had the amendment been made sooner, nor name any witnesses whom it could produce if a new trial were granted, and the amendment was but an enlargement of that which was sufficiently stated in the count before it was amended, *held* the allowance of such amendment and the denial of a new trial were not error.

7. DAMAGES, § 112*—*when verdict for personal injuries to woman not excessive.* A verdict of $7,000 awarded a female art demonstrator, forty-eight years old, earning $140 per month, her traveling and hotel expenses being allowed her, for injuries consisting principally of partial ankylosis of the right shoulder, which prevented her from following her occupation, *held* not excessive.

8. CARRIERS, § 476*—*when evidence insufficient to show that passenger was habitual litigant.* Evidence in an action for personal injuries against a railroad company, *held* not to show that the plaintiff was engaged in the business of being injured on railways.

9. EVIDENCE, § 148*—*when exhibition of injured member not error.* On the trial of an action for personal injuries, consisting in part of partial ankylosis of the shoulder, *held* that allowing the witness to hold up her arm to demonstrate the extent to which freedom of movement had been impaired was not error.

10. APPEAL AND ERROR, § 1625*—*when error in sustaining objection to admission of evidence cured.* Objection to a question addressed to a physician, who had treated the plaintiff in a personal injury action, as to how much he charged her, *held* improperly sustained where followed by a question as to whether the amount charged was the usual and customary charge for such service.

11. TRIAL, § 91*—*when necessary that objections to evidence be specific.* A general objection to a nonresponsive answer is not a sufficient basis on which to assign as error the overruling thereof, as the nonresponsiveness of the answer should be specifically pointed out.

12. APPEAL AND ERROR, § 1625*—*how error in improperly sustaining objection to question cured.* Allowing a nonresponsive answer, not properly objected to, which was responsive to a prior question, objection to which was improperly sustained to stand, *held* equivalent to a change of the ruling sustaining such objection and to cure the error therein.

13. APPEAL AND ERROR, § 1712*—*when errors not argued in brief*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

waived. Errors in the record not argued in the opening brief on appeal are thereby waived and cannot be availed of by the appellant.

14. INSTRUCTIONS, § 159*—*how considered.* Instructions are to be considered as a series, and vagueness of meaning or doubt as to one instruction may be cured by others.

15. APPEAL AND ERROR, § 1543*—*when instruction on credibility of witnesses not reversibly erroneous.* An instruction as to determining the credibility of witnesses whereby the jury were allowed to consider all "the surrounding circumstances appearing on the trial," *held* not reversible error in view of other instructions given.

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

JOHN A. RUSSELL, for appellant.

SNAPP, HEISE & SNAPP, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Miss Ida M. Tindall was a passenger in a sleeping car on a Chicago & Northwestern Railway train from Duluth to Madison, Wisconsin, and claims that she was there improperly caused and permitted to alight from said car in the nighttime in the yards some distance from the station of the railway company at a place insufficiently lighted and in a place to which she was a stranger and without information how to reach the station, and that in seeking to find her way out she stepped into a depression and was severely jarred. She claims that she was carrying a heavy suit case and that the shoulder of the arm with which she was carrying this suit case was injured, and that said injury became permanent and deprived her of the ability to perform the lucrative employment which she then had. She sued the railway company and the Pullman

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

company. She filed several declarations. There was a jury trial. At the close of the plaintiff's evidence, the jury, by direction of the court, returned a verdict finding the Pullman company not guilty. The case finally went to the jury against the railway company upon an additional count as amended. This count, after suitable allegations charging the operation of the railroad and the relation of carrier and passenger, and the duty of the railway company to its passengers, charged that the company negligently failed to give the plaintiff timely notice of the approach of the train to the station at Madison, and reasonable time to prepare to leave said train and sleeping car at the station with convenience and safety; that plaintiff was therefore unable to leave said train and car at said station and was compelled to remain in said car until it was moved by the railway company from said station at the place appointed for passengers to alight to another part of the yards in the station grounds and detached from said train; and that defendant "negligently permitted and invited plaintiff to alight from said sleeping car at a place which was dark and insufficiently lighted"; and that by reason thereof and through such negligence of defendant, plaintiff, while in the exercise of due care, "was invited, permitted and directed to, and did, alight in the nighttime and while it was dark from the said sleeping car in the yards of said railway company" at a great distance from the station, and that while plaintiff, who was a stranger to the surrounding conditions, was proceeding with due care and caution by the best apparent route from said car in the nighttime in the darkness, over and through the tracks and yards of the company to the station, carrying her hand baggage, she stumbled and fell over some obstacle or into some hole or depression, the precise nature of which, on account of the darkness, is to plaintiff unknown, and she was caused to lurch or was thrown and wrenched or

jerked with great force, and greatly strained, bruised and hurt, and was permanently injured in her body, arm and nervous system, and suffered great pain, and was prevented from attending to her business and affairs, and lost great gains and profits which she otherwise would have acquired. Plaintiff had a verdict for $7,000. Motions by the railroad company for a new trial and in arrest of judgment were denied. Plaintiff had judgment on the verdict, and the railway company prosecutes this appeal.

At the close of all the evidence appellee, by leave of court, amended the additional count so as to state more definitely than before that the place which the count originally said was dark was also insufficiently lighted. Appellant contends in its brief that at the close of the plaintiff's evidence, certain things were said by counsel for the respective parties and by the court concerning this additional count and the charges therein which amounted to a contract by appellee that she would not amend said additional count; and that the amendment so permitted at the close of all the evidence was a violation of that agreement, took appellant by surprise and was reversible error. This position is entirely based upon the statements contained in an affidavit of counsel for appellant contained in between seven and eight printed pages of the abstract. There are two reasons why this affidavit cannot be considered, and a third reason why it cannot prevail: (1) This affidavit is not contained in the bill of exceptions. In a common-law record, affidavits on file can only be brought to the attention of a reviewing court by being embodied in a bill of exceptions. The clerk of the court has no authority to insert in that part of the record kept by him any affidavit or other paper on file, excepting the pleadings and the like which are of themselves a part of a common-law record. The fact that the clerk inserts an affidavit or other paper and certifies that it is on file in the case, or that it was filed on

a certain date, does not make that affidavit or paper a part of the record which the reviewing court can consider. The rule is the same, to a large extent, in chancery. This has been held in a long line of decisions of which the following are examples: *Franey v. True,* 26 Ill. 184; *Schlump v. Reidersdorf,* 28 Ill. 68; *Heacock v. Hosmer,* 109 Ill. 245; *Lange v. Heyer,* 195 Ill. 420; *DuQuoin Water-Works Co. v. Parks,* 207 Ill. 46; *Bellinger v. Barnes,* 223 Ill. 121; *People v. Donaldson,* 255 Ill. 19; *People v. Taxman,* 186 Ill. App. 348. Not only is this affidavit not contained in the bill of exceptions, but the bill of exceptions does not show that at the close of the plaintiff's case or at any other time, any such conversation as is alleged was held between court and the counsel for the respective parties, or that anything was said or done upon the subject of relying upon this additional count as it then stood. The record, therefore, does not present at all the question so elaborately discussed.

(2) If the affidavit had been embodied in the bill of exceptions as a part of the showing made upon the motion for a new trial, it cannot be considered by this court. That which occurred in the presence of the court at the trial cannot be preserved for review by affidavit. What is said and done by the trial judge and what occurs in open court in his presence is within his knowledge and must be recited in a bill of exceptions vouched for by his certificate. If a defeated party could be permitted to make such matters a part of the record by ex parte affidavits, then on a motion for a new trial affidavits might be filed to show what rulings the court made upon the evidence and the instructions. If a trial judge does not remember what occurred he may refresh his recollection by having the notes of the reporter read to him, or by recalling witnesses or jurors, or he may, of his own volition, receive affidavits; but when his recollection has been refreshed it is he

who must certify to the facts, and such facts can only be reviewed upon his certificate as to what occurred. If after the filing of such an affidavit for a new trial the court denies the motion, it will be presumed in support of the action of the court that the trial judge knew that the statements in the affidavit of what occurred in open court were untrue, or that their effect was obviated by other things which occurred in open court to the knowledge of the trial judge. Among the many cases in which this rule has been announced are *Mayes v. People,* 106 Ill. 306; *Peyton v. Village of Morgan Park,* 172 Ill. 102; *Deel v. Heiligenstein,* 244 Ill. 239; *People v. Strauch,* 247 Ill. 220. The contents of the affidavit referred to in the case last cited more fully appear in the opinion of the Appellate Court in the same case, 153 Ill. App. 544. This bill of exceptions only shows that at the close of all the evidence appellee asked and obtained leave to make the amendment over the objection of appellant. The court does not recite anywhere in the bill of exceptions the things upon which the appellant relies to make it error to permit the amendment.

(3) The statute permits the amendment and appellee had a right to make it. If appellant was thereby taken by surprise and desired to obtain other witnesses from Madison on the subject of light, it should have asked for time to do so, or for a continuance. It is obvious from the evidence in the record that appellant had very thoroughly gone into the subject of the lighting at that station and in its yards. It did not ask for either a postponement or a continuance. This cause was tried in May, 1915. This affidavit was sworn to on July 12, 1915, but was not filed until December 29, 1915. It does not state that appellant found any witnesses whom it would or could have produced if the amendment had been made sooner. It does not name any other witness whom it could produce if the new trial were granted because the amendment was al-

lowed that late. It is obvious that appellant was not deprived of any proof which it could have presented. Moreover, the amendment was but an enlargement of that which was already sufficiently stated in the additional count.

The proofs tend to show the following facts: On the evening of February 5, 1914, appellee left Duluth, Minnesota, on a trip to Lancaster, Wisconsin. Her route required her to change cars at Madison, Wisconsin. She took the Duluth Limited, a train running from Duluth to Chicago through Madison. She had a berth in what was called the Milwaukee sleeper, a car which was to be detached from that train at Madison and proceed from thence to Milwaukee. She gave orders to the porter to call her thirty-five minutes before the train would reach Madison, so that she would have time to dress before the train reached the station. She testified that it usually took her from twenty-five to thirty minutes to dress in a sleeper. The train was due to be at Madison at 4:25 a. m. of February 6th. It reached there two minutes late. The porter called appellee shortly before the train reached the station. His excuse for this was that this Milwaukee sleeper did not immediately leave Madison but remained at that city until about 5:00 a. m., so that after the train reached Madison she had ample time to dress. Appellee knew that this sleeper was to be detached from the Duluth Limited at Madison, but she did not know that it remained so long a time at Madison. It is claimed that on cross-examination she testified that she did know that fact, but an examination of her entire evidence satisfies us that she only means that she learned that fact shortly before she left the car, and after she had dressed. Appellee was evidently angry at the porter for not having called her as directed, and she dressed with haste. According to her evidence the porter was sulky and impertinent in reply to her question

why he did not call her as directed. The day coaches were behind the sleepers, and the Milwaukee was the rear sleeper. The course pursued at Madison customarily and on this occasion was this: After the day passengers had alighted from the day cars an engine was attached to the rear of the train and took the day coaches and the Milwaukee sleeper back into the yards. The train had come in on track two, which was nearest the station. The train was taken north to certain crossovers which are outside of the plat in evidence, and made to cross over tracks three and four, and the sleeper was placed on track five, north of Blount street. The course of the railroad at this station was southwest and northeast. Blair street was southwest of the station, and the station faced it. There was a slight curve in the main tracks at the station. Blount street was the next street north of the station. There were train sheds, called umbrella sheds, which ran from Blair street to Blount street, and ended there. Tracks three, four and five ended northeast of the station. When the Milwaukee sleeper had been placed on track five, the switch engine took the day cars back over the same route and attached them again to the end of the Duluth Limited, which usually left for Chicago about 4:35 a. m., or ten minutes after its arrival. It is said that appellee testified she left the car at 4:30, but an examination of her entire evidence shows that what she means is that it must have been at least 4:30, because she could not possibly have dressed in any shorter time. The train dispatcher's sheet shows that the Duluth Limited left at 4:37 that morning, and the porter testified that it was leaving when appellee got off the sleeper. There was for each track a brick platform rising some twelve or eighteen inches above the track on which the train traveled. There were many electric lights in the roof of each umbrella train shed. These lights were controlled by switches near the station in charge of the night station master. It was his

business and the custom to turn on the lights for a particular platform only just before a train arrived at that platform to discharge passengers. As soon as the train started to leave the station it was the duty and custom to turn off the lights in that train shed. The other train sheds were left unlighted. There were incandescent lights over the various doors of the depot. The lights fronting Blair street could not be seen from track five where the sleeper was, which was northeast of the depot perhaps six hundred feet or more. One witness testified that on that occasion this car was parked forty feet beyond Blount street, others sixty feet, and another one one hundred and sixty feet. The brick platforms extended that far, and there were some lights on iron posts on each platform beyond the train shed, but those lights were also controlled by the same switches referred to. There was a light over the express door, another over the baggage door, and another over the doors to the station that were in the direction where this car was. Those lights were called owl lights, were of sixty candle power, and were only intended to aid persons at the station to find the doors. The waiting room at the station was two stories high and had glass on the side towards where this car was, and it had eight clusters of lights, four of which were left lighted in the nighttime when a train was not there. Appellee had been through Madison on this road before, but not in the nighttime, and she had never been in those yards where this car was parked. When she got off this car the station was southwest of her, the town was to the northwest and the yards extended on to the northeast and east for a long distance, and there were in them many switch lights then burning. One witness said that twenty-five or thirty switch lights were visible from that point. The undisputed proof is that it was a very foggy morning. The porter of the sleeping car testified once that it was unusually dark, and another time that it was not any darker than

usual. Appellee testified that she asked the porter the direction to the depot after she had alighted from the car, and that, so far as she recollects, he made no reply, but instantly got upon the car and went into it and slammed the door. He testified that he pointed to her the direction. She did not know where she was and she did not know in which direction the station was, and she started off towards some lights which she saw, but after going a little ways thought she was wrong and went in another direction and was entirely confused. She saw, a little distance away, an engineer oiling his engine and holding a lighted torch. She determined to go to him and ask her way. Just then he went around to the other side of his engine and thus deprived her of the light of his torch. As she went she stepped into some depression which we believe to have been the depression where the track was below the brick platform. She was carrying a heavy suit case. She carried no trunk in her travels and therefore had in her suit case her wearing apparel, and the books and papers which she used in the business in which she was engaged. She plunged forward several times, but did not fall. Soon thereafter she noticed pain in her shoulder which continued to increase as hereafter stated. The engineer came back to that side of the engine and directed her how to reach the station down the brick platform. She went to the station, asked the ticket agent to whom she should make complaint of the porter, and was directed to another station man on duty, and told him she wanted to complain of the porter for his insolence and for not calling her as directed, and then she went into the ladies' dressing room. This officer says he asked her if she was hurt and that she said no. She denies that she was asked that question or made that answer. She suffered pain while there. She took the train for Lancaster about 8:00 a. m. She did but little at Lancaster on account of the pain she suffered. The next day, which was

February 7th, she went back to Madison, went to a hotel and obtained the address of a lady osteopath and went to her for treatment. She asked to have an examination made to see if her shoulder was not out of joint. She returned to the hotel, walked the floor much of the following night, sent for the housekeeper for relief during the night and did have some appliances to relieve her pain then, and she took the Duluth Limited on the morning of February 8th for Chicago. When she arrived at the depot in Chicago she went to the rest room and complained to the nurse of her suffering and the nurse sent for the company doctor and the company detective and they examined her shoulder and did not find it discolored or inflamed. About the middle of the day she went to Joliet. She had a sister, Alice P. Tindall, who was private secretary to the warden of the Illinois State Penitentiary and who had a room in the woman's prison there. Appellee went to that sister and she sent for Dr. Grant Houston, a practicing physician of Joliet, and by him appellee was thereafter treated for a considerable time. He found a discoloration of the shoulder which reached two-thirds of the way to the elbow, and according to other evidence later reached to the wrist. He found inflammation in the shoulder and took her to a hospital for examination and treatment. The final result was a partial ankylosis of the shoulder joint, which reduced the ability of Miss Tindall to move her arm to twenty-five to thirty per cent. of its normal action. At one time in order to overcome any intentional or unintentional resistance by the patient, Dr. Houston put appellee under an anæsthetic, and then did all that he could do to move the arm, and could produce no greater movement than above stated. One of the examinations was by Dr. Houston and a Dr. Hopkins, a medical man who was there representing appellant. Appellant did not call Dr. Hopkins as a witness. Appellant in its brief here has accused appellee of being a malingerer, but not only

is there no evidence whatever to that effect, but the absence of Dr. Hopkins from the witness stand, without any explanation, deprives that claim of any right to serious consideration.

Appellant called the osteopath, the housekeeper of the hotel at Madison, the man who met appellee in the station that morning, those who met appellee in the Chicago station on the 8th, and in the main they fully corroborated appellee as to the fact that she claimed to be suffering pain in that shoulder. There were some slight discrepancies testified to by them. The osteopath when examined in chief testified that appellee told her that she hurt her shoulder by being jammed against the corner of an omnibus. On cross-examination she admitted that she, herself, had had an experience of that kind and that she very likely repeated the story to appellee that morning. Another of these witnesses had been told by appellee of her being hurt, and it was the recollection of that witness that appellee said she was hurt after she talked with the engineer, whereas appellee testified that it was while she was trying to reach the engineer and after she had seen him. These supposed contradictions by witnesses whose attention was not again directed to the matter for several months did not in the minds of the jury weaken the testimony of appellee, and do not tend to show that the main features of her narrative are untrue.

Appellant contends many times in its brief that there is not a word of testimony to show whether it was the right or the left shoulder of appellee which was injured, and that if it was not the shoulder used by her in her employment hereafter described, then she could not have been seriously injured, and the verdict would be excessive. On slightly examining the evidence on this subject we have found five witnesses who testified that it was her right shoulder and her right arm of which she complained, and some of those wit-

nesses were called by appellant. Appellee testified that she had never received any violent injury, or any injury of any kind to her right arm or her right shoulder, before the accident involved in this case. Appellee also testified that she was right-handed and could not do her work with her left hand. It is manifest that there were references to the arm in the presence of the jury which indicated which arm it was, that could not well be incorporated in the bill of exceptions. For instance, in the presence of the jury appellee held up an arm and showed how far she could raise it, and the jury knew, therefore, whether it was the right or the left arm.

Appellant contends that on the question whether there was sufficient light at the place where appellee was injured, her testimony stands alone, and is disputed by thirteen witnesses called by appellant, and that the jury cannot be permitted to decide in favor of one and against so many other witnesses. We do not find that to be the state of the record. The material question was whether the place was sufficiently lighted at the time that appellee was hurt. Most of the witnesses to whom appellant refers were not at that station that night and did not know what lights were burning and what were turned off at the time in question, and did not know whether a heavy fog was prevailing. They did prove that when all the platform lights were burning, the place was sufficiently lighted in ordinary weather. They did prove that they were familiar with the station and the yards, and had often been through the yards at this place in the nighttime, and knowing where they were and what the proper route to the station was, were able at any time when they were there to see their way with sufficient clearness to avoid injury. Appellee testified there was a heavy fog at that time. No one denies it. Appellee testified that she saw nothing by which she could tell

where the station was or what direction she ought to take. The porter testified that the Duluth Limited was leaving the station as appellee left the car. It was the custom for the station master to turn off the platform lights as soon as passenger trains started. The station master had no recollection when he turned off these lights on this particular night, and the jury might fairly infer that they were turned off as soon as the train started to leave, and that those platform lights were not burning when appellee started to leave the car. If they were not, there were no lights then burning at the station except the owl lights over about four or five doors, not intended to cast any light into the yards at all, and the lights inside the waiting room, and there were twenty-five or thirty switch lights burning in other directions and visible to appellee after she got off the car. After the engineer had directed her where to go to reach the station, she was able to find her way, but there was no preponderance of evidence that at that time, before she obtained that information from the engineer, she could see where to go; nor was there any evidence that the depressions where the tracks were below the sides of the platforms were not in darkness. Between appellee and the station were an iron fence and numerous upright posts supporting the train sheds, and supporting the platform lights when burning. There is no doubt but that appellant did prove by a strong array of testimony that this is a well-built station, and that when all the lights were burning it was exceedingly well lighted; but there is no preponderance of evidence that a woman left in the yards in the nighttime, on a foggy night after the platform lights had all been turned off, could see to leave a car and find her way safely to a station of whose situation she was entirely ignorant. The jury believed appellee.

Appellee was about forty-eight years old when this injury was received. She had been a teacher all her

adult life. After teaching in various positions in private and public schools mathematics and other studies, she went to perfect herself in the study of art in two eastern institutions, and thereafter became a teacher and demonstrator of art. The Prang Company publishes, introduces and sells a system of art instruction for the public schools. Wherever a school board buys the Prang appliances and installs the Prang system, the Prang Company sends a demonstrator to that school, who, upon the blackboard and upon large sheets of paper, instructs the teachers of those schools how to give art lessons to the pupils according to the Prang method. Appellee became the circuit instructor of the Prang Company for the States of Illinois, Wisconsin and Iowa, at a salary of $140 per month for ten months in the year, and she spent the other two months in conducting a similar art school at the University of Colorado. Besides the salary of $140 per month she was paid her hotel and traveling expenses, and as she was constantly on the road working for the Prang Company during ten months of the year, she practically received what would be equivalent to her board and lodging besides $140 per month. Prior to this injury the Prang Company had entered into an agreement to pay her during the next year $166.66 per month besides her traveling expenses and hotel bills for ten months in that year. This work required the free use of her right arm and shoulder. After she had received all the benefit she could obtain from medical treatment she found herself entirely unable to do the work on account of this partial ankylosis of her right shoulder, and she was obliged to leave that employment. She undoubtedly can teach, at much lower wages, portions of the common school system, but she has lost by this injury the entire benefit of the higher training which at considerable time and expense she had obtained in these eastern institutions, and she has lost this lucra-

tive salary and her expenses. While $7,000 is a large sum, yet it is evident that it would not take many years to cover that verdict with the actual pecuniary loss she has sustained by the reduction of her earning power. Besides this, she has suffered much and long continued pain. We are unable to say that the damages are excessive.

The defense proved that a few months before this injury appellee was in a wreck on the Illinois Central Railway, and that she had correspondence with the authorities of that road concerning the injury which she received. Apparently it is sought to create the impression that appellee was engaged in the business of being injured on railways. An examination of all the evidence on that subject shows that she was in a passenger car which was in a wreck; that she received some injury to her back; that she caught a severe cold because the passengers were without heat for many hours in a cold part of the year; but that she did not make a claim against the company; but, on the contrary, the claim agent of the road sought her out persistently and urged her to settle for $100, and that the railroad sent a surgeon, who was a friend of her family and knew her well and had been her family physician, to examine her as far as he could without her knowing that she was under examination, and that she desired not to settle until she found out whether she was seriously injured but did not wish to put the matter in the hands of a lawyer, and finally accepted $125 which the railroad company at last offered. It is obvious that it was the railroad company that sought her persistently to settle with her, and evidently the railroad company feared that she might go to some lawyer and it might prove more serious for it. It was positively proven that there was no injury to her shoulder and arm in that connection. There was nothing to justify the jury in supposing that the injuries of which

she now complains were in any respect attributable to that accident.

At the request of appellee's counsel and over the objection of the appellant, appellee, while a witness, was requested to raise her arm as high as she could, and she did stand up and she did raise her arm. It is contended that this was erroneous. We are of opinion that the ruling of the court in permitting this to be done was sustained by the principles announced and authorities cited in *Springer v. City of Chicago,* 135 Ill. 552; *City of Lanark v. Dougherty,* 153 Ill. 163; *Swift & Co. v. Rutkowski,* 182 Ill. 18; *Chicago Terminal Transfer R. Co. v. Kotoski,* 199 Ill. 383; *Chicago & A. Ry. Co. v. Walker,* 217 Ill. 605, and by several of the Appellate Courts, including this court. In *Prichard v. Moore,* 75 Ill. App. 553, we said: "It was not error for plaintiff while on the witness stand to show to the jury to what extent he could move his arm. That demonstration simply made more plain to the jury that which is usually described in words." We may add that in this case it was also described by witnesses in words.

It is contended that the court erred in admitting testimony as to the amount of Dr. Houston's bill. The matter is not fully set forth in the abstract. The record, page 132, is as follows:

"Mr. Heise: You had no contract with Miss Tindall in regard to your professional services, in advance?

"A. No, sir.

"Q. Do you recollect now how much you charged her?

"A. Yes, sir.

"Q. How much was it?

"Mr. Russell: The question is objected to.

"The Court: Objection sustained.

"Mr. Heise: Was the charge you made the usual, customary and going charge for services of that kind in Joliet?

"Mr. Russell: The question is objected to.

"The Court: Let him answer.

"(To which ruling of the court, counsel for defendant, the Chicago and North Western Railway Company, then and there duly excepted.)

"A. Forty-one dollars.

"Mr. Russell: I object to the answer, and move that it be stricken out.

"The Court: Motion denied; let it stand.

"(To which ruling of the court, counsel for defendant, the Chicago and North Western Railway Company, then and there duly excepted.)"

Appellee argues that in making up the bill of exceptions, something was accidently omitted which escaped the attention of counsel for appellee before the bill of exceptions was signed. We, however, must accept the bill of exceptions as it reads as being correct, in the absence of any action in the court below to have it corrected. We are of opinion that to the question how much Dr. Houston charged appellee for his services in treating her for this injury, the objection made should have been overruled, under *Schmitt v. Kurrus*, 234 Ill. 578. The answer "Forty-one dollars" to the question whether the charge made was the usual customary and going charge for services of that kind in Joliet was obviously not responsive to the question, but that objection was not made to it nor was the motion to strike it out based upon that ground, but only upon general grounds. If attention had been called to the fact that the answer was not responsive to the last question, it could not have failed to be sustained. That specific objection not having been made when it could have been obviated, the general objection will not avail, as stated in *Rich v. Trustees of Schools*, 158 Ill. 242, and in other cases, followed by *Merchants' & Farmers' State Bank of Sullivan v. Dawdy*, 230 Ill. 199. The answer was, of course, to the first question; and as it must have been obvious to the court that it was not an

answer to the second quesion, but was an answer to the first, the action of the court in permitting the answer to stand may be considered as equivalent to a change of the ruling as to the first question, and holding it competent. In that part of the record above quoted, appellant has no objection which is tenable. The court ruled correctly. The specific objection which would have caused the matter to be corrected was not made. Appellee had a right to prove what the charge was, and that is all that there appears. The seventeenth instruction given at the request of the plaintiff permitted recovery for moneys necessarily expended or become liable for doctors' bills, if any, while being treated for such injuries. Appellant might have raised the question upon the giving of that instruction, but while it has attacked other instructions in its brief and argument, it has not questioned that instruction. The rule is familiar and does not require citing of authorities that any error in the record not argued in the opening brief is thereby waived and cannot be availed of by the appellant. So any error in giving that instruction is waived. We do not feel authorized to reverse the judgment because of this peculiar condition of the bill of exceptions as to the testimony on that subject.

Complaint is made of the ninth instruction given at the request of appellee. It states that it is the duty of a carrier of passengers to keep the platforms used in discharging passengers and all passageways leading to and from said places in a reasonably safe condition for that purpose, and if a violation of that duty entailed injury upon passengers without the fault of the latter, the carrier is answerable in damages. It is not denied but that this is a correct statement of the law, but it is argued that it left the jury in uncertainty as to what the question was on which they were to pass. This instruction did not direct a verdict and the instructions are to be considered as a series. If there

was any possible clouding of the issues under that instruction it was removed by various other instructions given. The issues the jury were to try were stated in instructions given at the request of defendant, Nos. 11, 12 and 13, and others, and the matter of proper light was therein specifically and definitely pointed out. Moreover, in No. 14, given at the request of appellant, reference is made to "acts of negligence" so that the jury could clearly get the idea from that instruction that more than one matter was relied upon as negligence in this case, and appellant cannot complain of that which it procured by its instruction. Complaint is made of the first instruction given for appellee, because in discussing the question of the credibility of witnesses, the jury were allowed by it to consider all "the surrounding circumstances appearing on the trial." This instruction was criticised by us as of doubtful propriety in *Ames v. Thren,* 136 Ill. App. 568. It is taken word for word from *North Chicago St. R. Co. v. Wellner,* 206 Ill. 272, and the instruction is there approved, though these words here complained of were not there discussed. The instruction has been approved by the Appellate Court, first district, in *Hopp v. Chicago City Ry. Co.,* 170 Ill. App. 72. Appellant's fourteenth instruction told the jury that appellee must prove one or more of the acts of negligence charged against the appellant in her declaration by a preponderance of all the evidence in the case, and with that cautionary instruction in the record we are of opinion that we ought not to reverse because of the language above quoted from the first instruction. It is also worthy of note that in the second instruction given at the request of appellee, the expression used was "from all the evidence, facts and circumstances in evidence," showing that the facts and circumstances to which the attention of the jury were called were those appearing in the proof. Complaint is made of the third instruction given at the request of appellee re-

lating to the law where two witnesses testify just opposite to each other on a material point. It is not denied that this states the law correctly, but it is urged that there was no condition upon which to predicate such an instruction, and it is claimed that on the material questions, the evidence is that of appellee against thirteen witnesses on the opposite side. We have disposed of that contention elsewhere, but this instruction properly applies to the evidence of appellee and of the porter, who, in certain particulars already mentioned, testified in contradiction to each other. The instruction was therefore properly given. We find no reversible error in the record and the judgment is therefore affirmed.

Affirmed.

Harmon Drainage District No. 2 of Lee County, Illinois, Appellant, v. Lynn P. Parker, Appellee.

Gen. No. 6,292.

1. DRAINAGE, § 39*—*when interest of commissioner does not disqualify.* The fact that a commissioner of a district, organized under the Farm Drainage Act (J. & A. ¶ 4475 *et seq.*), was the owner of part of the land to be benefited by an improvement in favor of which he cast the deciding vote, *held* not to make the resolution authorizing such improvement void.

2. DRAINAGE, § 72*—*when organization of subdistrict unnecessary.* Where lands within a district organized under the Farm Drainage Act (J. & A. ¶ 4475 *et seq.*) have not been benefited as contemplated at the time of the organization of the district, it is the duty of the commissioners to so improve the system that such lands will be benefited as originally intended, the expense thereof to be paid from the general fund of the district; and the organization of a subdistrict is not necessary.

Appeal from the County Court of Lee county; the Hon. JOHN B. CRABTREE, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CLYDE SMITH, for appellant.

MARK C. KELLER and H. A. BROOKS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On October 17, 1911, at a meeting of the Drainage Commissioners of Harmon Drainage District No. 2 in Lee county, a resolution was passed reciting that certain lands in said district described in the resolution were not benefited in proportion to their classification and required additional drainage, and ordering a tile to be laid through certain lands. The motion was adopted, two of the three commissioners voting for and one against the proposition. Lynn P. Parker was one of the commissioners and one of the owners of the land to be benefited by said tile and he voted for the proposition, and without his vote it would not have been adopted. Thereafter the work was done, and the drainage district paid therefor $78.29. On December 22, 1914, said district brought suit before a justice of the peace to recover said expenditure from Lynn P. Parker. The justice gave judgment against the district and it appealed to the County Court of Lee county, where the case was tried without a jury and judgment was rendered against the district. It prosecutes this further appeal.

It is contended that by reason of interest Parker was disqualified to vote for said resolution, and it therefore was not adopted. In support of this position reliance is had upon *Chase v. City of Evanston,* 172 Ill. 403; *Murr v. City of Naperville,* 210 Ill. 371; and *Vandalia Levee & Drainage Dist. v. Hutchins,* 234 Ill. 31. We are of opinion that this principle does not apply to drainage districts organized under the Farm Drainage Law (J. & A. ¶ 4475 *et seq.*). In *Scott v. People,* 120 Ill. 129, speaking upon this subject, the court said:

"It is next urged, that to permit the commissioners to pass upon the question of enlargement of the district would be to have it determined by an interested tribunal. To a limited extent this is true, but it does not therefore follow that the decision of the question, when made, would not be binding. In matters of mere local concern, which are of a public or *quasi* public character, this, in many cases, cannot be avoided without great inconvenience. It is every day's experience for property owners in small villages to sit as jurors in corporation cases for the recovery of penalties under ordinances, and yet we presume there are few who would now question their right to do so, on the ground of interest. So township and county officers are constantly in the habit of making up and auditing their own accounts for services to the public, and no one, we presume, questions the validity of these official acts on that ground. They are, in most cases, largely ministerial, and the interest is so small and insignificant that the law does not regard it. To hold this objection good would strike at the very foundation of the whole drainage system." In *People v. Cooper*, 139 Ill. 461, it was contended that certain proceedings taken by the commissioners of a farm drainage district were void because the commissioners were interested. The court there said: "It is not the rule, however, so far as we are aware, that interest as a landowner or taxpayer in a municipal or *quasi* municipal corporation disqualifies a person for holding an office in such municipality, or for performing any duty incident to such office, although his own personal or pecuniary interest may to some extent be affected by his action. And this must be especially true in case of drainage districts which are organized for the promotion of the private interests of the landowners within such districts. Nor are we aware that preconceived opinions or preferences of persons elected to such offices have ever been held to be a legal disqualification. On the contrary, municipal as

well as other executive and ministerial officers are not unfrequently elected because of their avowed opinions or preferences in relation to public measures which are likely to come before them for their official action. And the question is not materially affected by the fact that the ministerial or executive duties which he may be called upon to perform may involve more or less of *quasi* judicial action, or of discretion akin to what may properly be called judicial. Doubtless such officer may, as a matter of prudence or delicacy, decline to act in a matter in which he feels a personal interest, where his official duty may be as well performed by another, but if he chooses to perform the duty himself, it cannot be said that he acts without jurisdiction, or that his act is *ultra vires* and therefore void." *Vandalia Levee & Drainage Dist. v. Hutchins,* 234 Ill. 31, was under the Levee Act, and a distinction is there drawn between that act and the Farm Drainage Act; and *Scott v. People, supra,* and *People v. Cooper, supra,* were there referred to without disapproval. We therefore conclude that this action was not void because of the fact that Commissioner Parker owned a part of the land which was to be benefited by this action.

It is contended by appellant that if this work needed to be done, the funds of the district then in hand could not be used for that purpose, but that a subdistrict should have been organized, including the lands to be benefited by this particular drain, and they should have been assessed therefor. Section 17 of the Farm Drainage Act (J. & A. ¶ 4493) requires the commissioners to determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies as well as the present. Section 41 (J. & A. ¶ 4518) provides that if the commissioners shall thereafter find that by reason of error in locating or constructing the ditches, or any of them, or from any other

causes the lands of the district are not drained or protected as contemplated, or some of them receive partial or no benefit, they shall use the corporate funds of the district to carry out the original purpose, to the end that all the lands, so far as practicable, shall receive their proper and equal benefits as contemplated when the lands were classified; and that if sufficient funds are not on hand for this purpose, the commissioners shall make a new tax levy, showing that it was contemplated that if there were funds on hand, they should be used for that purpose. In *Peotone & M. Union Drain. Dist. v. Adams,* 61 Ill. App. 435, and 163 Ill. 428, these sections of the statute were construed and the duty of the commissioners to give such relief in a proper case was announced and enforced, and to the same effect is *Langan v. Milk's Grove Spec. Drain. Dist.,* 239 Ill. 430, which plainly indicates that the funds on hand are to be used to do the required work. This ditch was made to run from the lands and through the lands of W. D. Parker and Lynn P. Parker and Fred Geyer. Geyer's lands were the nearest to the drains of the district and were slightly higher than the lands of W. D. Parker and Lynn P. Parker back of the Geyer lands, and because of the slight elevation of the Geyer land, water in times of heavy rains stood upon the Parker lands to their great detriment. When this drainage district was established and the classification of the lands was made, the land now owned by Lynn P. Parker was then owned by his father, Boardman Parker. The proof, as we understand it, shows from appellant's witnesses, as well as from appellee's, that these lands were classified to give an outlet to carry off this water from the lands back of the Geyer land, but when they came to put in this improvement Boardman Parker said he did not want this outlet put in, and so it was left out, and this land did not receive the drainage which was contemplated when it was classified. After the title thereof passed to Lynn P. Parker he desired the drainage

which had been intended when the lands were classified. Under the authorities above cited we are of opinion that as the lands were classified to give an outlet for this water from these lands, it became the duty of the commissioners to furnish such outlet, and they were required to use the funds of the district to establish the outlet if they had funds for that purpose. See also, *French v. Bates,* 185 Ill. App. 38. It was not necessary that the commissioners should establish a subdistrict for this purpose. *People v. Sullivan,* 238 Ill. 386. As these lands were classified to have this outlet given them, they were also assessed for this outlet, and the money had been paid by the owners of these lands which was intended to be used for the making of this outlet.

As we hold that the resolution was lawfully adopted, and the money lawfully expended in performing the duty which the drainage district owed to these lands, it is unnecessary to consider the further question whether if this expenditure had been wrongfully made the money could be recovered in an action of assumpsit, and whether Lynn P. Parker would be liable for the whole amount, part of which was spent for the benefit of the lands of W. D. Parker. The judgment is affirmed.

Affirmed.

Dumont, Roberts & Company, Appellee, v. Alfred L. McDougal et al., Appellants.

Gen. No. 6,293. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill in equity by Dumont, Roberts & Company, complainant, against Alfred L. McDougal *et al.*, defendants, to foreclose an equitable lien. From a decree in favor of the complainant, defendants appeal.

Alfred L. McDougal, being indebted to the complainant on a promissory note, in order to prevent immediate steps to collect it executed to the complainant an assignment of all interests which might thereafter accrue to him as heir, legatee or devisee of his father. Subsequently he was discharged in bankruptcy, having listed the note among his liabilities, but the complainant did not prove it against the estate. After the death of McDougal's father, leaving him various legacies and devising property to him, some of which consisted of contingent interests, complainant filed a bill to enforce the lien. At the time of entry of the decree, all the property had become vested.

I. C. PINKNEY and TICHENOR, TODD & WILSON, for appellants.

VAIL, MILLER & POGUE, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. ASSIGNMENTS, § 4*—*when estates in expectancy may be assigned.* Estates in expectancy may be assigned and assignments thereof will be enforced in equity when such estates become vested, and this is so though such expectancy is made contingent by the provisions of a will.

2. BANKRUPTCY, § 58*—*what is effect of discharge.* The discharge in bankruptcy of the assignor of an estate in expectancy, subsequent to the assignment, will not defeat the right of the assignee to enforce in equity the lien created by such assignment.

Amanda Nelson, Appellee, v. Frank P. Nelson, Appellant.

Gen. No. 6,295.

1. DIVORCE, § 87*—*when temporary alimony properly allowed.* Where, on the hearing of a petition for alimony and suit money pending a suit for separate maintenance, it appeared that a marriage ceremony between the parties had been celebrated, *held* that such allowance was properly granted though the defendant in his answer denied the validity of such marriage.

2. MARRIAGE, § 26*—*what does not constitute prima facie case as to invalidity of marriage between divorced parties.* Proof that parties domiciled in Illinois who, within one year after being divorced from their respective husband and wife, were married in another State, does not amount to making out a prima facie case that such marriage was void, in the absence of proof that the parties contracted the marriage outside the State with the intent to circumvent the Illinois statute prohibiting divorced persons from marrying within one year from the granting of the divorce.

Appeal from the Circuit Court of Henderson county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916. *Certiorari* denied by Supreme Court (making opinion final).

CLIFFORD W. WARNER and HARTZELL & CAVANAGH, for appellant.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'HARRAS, WOOD & WALKER, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Amanda Nelson filed a bill of complaint against Frank P. Nelson in the Circuit Court of Henderson county and therein alleged that she was lawfully married to Frank P. Nelson on February 3, 1908, and that she left him on November 3, 1914, and she set up conduct of his which, if true, would entitle her to a separate maintenance, and she asked for that relief. Frank P. Nelson was served with summons. Thereafter Amanda Nelson filed a petition seeking temporary alimony and solicitor's fees and suit money and Frank P. Nelson answered that petition, and there was a hearing, and there was an order allowing her certain sums for her support during the pendency of the suit and for solicitor's fees and for expenses in the preparation of the cause for trial. It is conceded that Frank P. Nelson owns an equity worth about $40,000 in real estate in said Henderson county, and it is not contended that the allowance is excessive. This appeal by Frank P. Nelson is prosecuted on the sole ground that he is not liable to pay any sum whatever for this purpose.

The proofs show that prior to said marriage the parties resided in Henderson or Hancock counties, and that within one year prior to said marriage each of them was divorced from a former husband or wife in this State, and that on February 3, 1908, less than one year after said divorces were obtained by them, they were married to each other in Kirksville, Missouri and that at some time afterwards they returned to this State. The defendant had not yet answered the bill of complaint when this order was made, but in answer to the petition for alimony he asserts that said marriage was void and therefore he is under no

legal obligation to pay any alimony or suit money or attorney's fees. There are conflicting authorities in the different States of the Union on the question whether in such a case there is a liability to pay alimony *pendente lite,* and these authorities pro and con are collected in a note which begins on page 387 of volume 25, L. R. A. (N. S.) The law is fixed for this State by the decision in *Reifschneider v. Reifschneider,* 241 Ill. 92. The discussion of this subject begins on page 98 and on p. 100 it is said: "The marriage ceremony being admitted and only the legality questioned, the court was justified in allowing temporary alimony." This is in harmony with the rule stated in 2 Am. & Eng. Encyc. of Law (2nd Ed.) 104, where it is said: "It is generally held that proof or admission of a marriage *de facto* presents a proper case for the allowance of alimony *pendente lite,* although a marriage *de jure* is denied." The same doctrine is announced in 3 Am. & Eng. Encyc. of Law and Practice 125 (a work the publication of which has been suspended). In 1 Ruling Case Law 900, the general rule is thus stated: "Even though there is considerable dispute as to whether there is a marriage *de jure,* an allowance of temporary alimony may nevertheless be awarded provided one *de facto* is established either by admission or proof." In this case the proof shows a ceremony of marriage at Kirksville, Missouri, by a minister of the gospel. The marriage ceremony is therefore established and only the legality of that ceremony is questioned, and under the above authorities the allowance of alimony was proper. But more than that, it was not shown, even under defendant's theory, that this marriage was invalid. It is not the holding of our courts that every marriage celebrated in a foreign State by persons who have been divorced in this State within one year is void. In *Wilson v. Cook,* 256 Ill. 460, it was held that the intent of the Legislature was that when persons domiciled in this State, and

who are subject to the provisions of the law, leave the State for the purpose of evading those provisions and go through the ceremony of marriage in another State and return to their domicile in this State, such pretended marriage will not be recognized by the courts of this State. There was no allegation or proof that these parties went to Missouri for the purpose of evading the law of this State or for the purpose of marrying and then returning to this State. For aught that appears, it may have been their intention to remain in Missouri and to become citizens of Missouri. They did return at some time, but it is not shown when. They may have lived in Missouri for years after this marriage was celebrated, with no intention then of ever returning to the State of Illinois to live. As defendant was asserting that the marriage celebrated in Missouri was void, it was for him to prove that the purpose of the parties was merely to evade the provisions of our statute and to retain their domicile in this State. It is true that the license issued in Missouri described the parties as residents of this State, but there is no proof that appellee furnished that information to the officer, nor that it was followed by their immediate return to this State. Therefore appellant failed to establish even a prima facie case that the marriage was void. The parties lived together as husband and wife for six years and nine months after this marriage, and there is no proof how much of that time was spent in Illinois, and it ought not to be presumed against this wife that this was an invalid marriage. All of the presumptions are in favor of the validity of the marriage. The order is therefore affirmed.

Affirmed.

Charles E. Farrell, Administrator, Appellee, v. Reuben Bruce, Appellant.

Gen. No. 6,303. (Not to be reported in full.)

Appeal from the Circuit Court of Peoria county; the Hon. CLYDE E. STONE, Judge, presiding. Heard in this court at the April term, 1916. Reversed and remanded. Opinion filed August 10, 1916.

Statement of the Case.

Action of trover by Charles E. Farrell, administrator of the estate of John Farrell, deceased, plaintiff, against Reuben Bruce, defendant, for the alleged conversion by the defendant of certificates of deposit belonging to the intestate. From a judgment for plaintiff, defendant appeals.

The deceased, a man eighty years of age, a few days before his death called in some of his friends and by deed and bill of sale made various dispositions of his property, reserving to himself a life estate in a part thereof. Some certificates of deposit owned by him were at his direction brought from the bank in which he kept them and by his direction one of his friends began writing on the back assignments to Reuben Bruce, and be began signing his name to those assignments. He was in bed, and when a paper was ready for him to sign he was propped up in bed with a book placed on his knees, upon which he did the signing. He became tired and only partly wrote his signature on the fifth certificate, of which certificates there were twenty-five in all. An attendant suggested that he leave the signing of the rest until another day, and he handed to Bruce the five which he had assigned and told him with them to pay his funeral expenses and his debts and the rest should be his, and told the amount he wished paid on one debt, which he did not wish paid in full as he considered that the amount

charged him was not just. He handed the remaining twenty certificates to Bruce without assigning them and told him they were his, and Bruce took and carried away all of the certificates. He advised persons there present, to whom he had deeded some of his property, to have their deeds recorded immediately. A few days later, Bruce and several others were at deceased's house, and the twenty certificates were produced, and assignments on the back of each to Reuben Bruce were written. Deceased appeared not strong enough to write his name. One of the parties present wrote deceased's name to each assignment, and deceased affixed his mark to each. Shortly thereafter Bruce cashed these certificates. Deceased died eight days later.

GLEN CAMERON and SHEEN & GALBRAITH, for appellant.

QUINN & QUINN, for appellee; WEIL & BARTLEY, I. R. WASSON and JOHN E. DOUGHERTY, of counsel.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. TROVER AND CONVERSION, § 10*—*when trover lies.* Trover by an administrator will lie for the conversion of certificates of deposit of his intestate though the defendant cashed them during the intestate's lifetime.

2. TROVER AND CONVERSION, § 37*—*when burden on administrator to show lack of mental capacity in intestate.* In an action of trover by an administrator for the conversion of certificates of deposit which had belonged to the intestate and had been assigned in writing and delivered by him to the defendant, where the plaintiff claimed that at the time of making such assignment and delivery the intestate had not sufficient mental capacity to make a valid

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

assignment and delivery, *held* that the burden of proof to prove such fact was on the plaintiff.

3. GIFTS, § 22*—*when evidence sufficient to show mental capacity of assignor of certificates of deposit.* In an action of trover for the conversion of certificates of deposit belonging to the plaintiff's intestate and assigned and delivered by him to the defendant, evidence *held* to show that the intestate had sufficient mental capacity to make such assignment.

4. GIFTS, § 22*—*when evidence sufficient to show mental capacity to make.* In an action by the administrator of the estate of a deceased person for the conversion of certificates of deposit given by intestate to defendant, proof that deceased was hateful, bitter towards his children and profane, where there was no proof that he suffered from any insane delusion, *held* not sufficient to support a finding that he did not have sufficient mental capacity to dispose of his property.

5. GIFTS, § 22*—*when valid.* Where one has sufficient mental capacity to dispose of his personal property, the justness or unjustness of the disposition made thereof is immaterial on the question of its validity.

6. APPEAL AND ERROR, § 1413*—*when verdict set aside as against preponderance of evidence.* A verdict may be set aside as against the clear preponderance of the evidence though a verdict for the same party had been rendered on a former trial.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Illinois Midland Railway Company, Appellant, v. Farmers State Bank of Newark, Illinois, Appellee.

Gen. No. 6,314.

1. BILLS AND NOTES, § 109*—*when order not negotiable.* An order payable on the completion of the construction of a railroad, *held* not negotiable, inasmuch as the event named might never have happened.

2. ASSIGNMENTS, § 33*—*when recovery on assigned non-negotiable chose in action denied because of insufficiency of pleading.* Where a plaintiff suing in his own name as assignee of a non-negotiable chose in action failed to allege on oath that it was the actual bona fide owner thereof, or how or when it acquired title thereto, except that the date of such acquisition was laid under a *videlicet*, *held* that no recovery could be had, inasmuch as the plaintiff had not complied with section 18 of the Practice Act (J. & A. ¶ 8555).

Appeal from the Circuit Court of Kendall county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

SIDNEY N. WARE, for appellant.

JOHN M. RAYMOND and JOHN K. NEWHALL, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

In an action of assumpsit, pending in the Circuit Court of Kendall county, brought by Illinois Midland Railway Company against Farmers State Bank of Newark, Illinois, on February 25, 1916, plaintiff withdrew its original declaration and by leave of court filed in lieu thereof an additional special count, to which defendant demurred. The court sustained the demurrer, the parties abided by their pleadings, there

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

was a judgment in bar against plaintiff, and plaintiff prosecutes this appeal therefrom.

Said additional special count alleged that plaintiff at a certain date was about to construct a railway in Kendall county from Millington, a junction with the Chicago, Burlington & Quincy, to Newark, and that thirty-nine persons there named, and others, deposited in the defendant bank the sums of money set opposite their respective names, aggregating $6,105, to aid in such construction; that on October 27, 1913, said subscribers named, with the consent of plaintiff, directed defendant to pay to M. C. Connors & Company, "under the name of railroad contractors," said sums of money by the following instrument in writing:

"Newark, Ills., Oct. 27, 1913.

"Farmers State Bank,
Newark, Ills.

"Pay to the Railroad Contractors with the Illinois Midland Railway my subscription now in your possession to aid in paying such Contractors for construction when that section of the road is built which lies between Newark and a junction point with the Chicago, Burlington & Quincy on the north and the first train reaches Newark over such section";

that defendant accepted said order and promised to pay said railroad contractor "said sums of money so on deposit under and by virtue of the terms of said order above specified"; that "on, to-wit, February 14, 1914," all said conditions had been fulfilled, said railroad had been constructed between Newark and a junction point with the Chicago, Burlington and Quincy on the north and a train thereon had reached Newark, and that M. C. Connors & Company had built it in reliance on said order; that on said day plaintiff ordered defendant to pay said subscriptions to said railroad contractors; that by virtue of said facts, defendant was indebted to said railroad contractors and they demanded of defendant said sum of money, but defendant refused to pay it; that on November 26, 1915, by

a writing commonly called an assignment, M. C. Connors & Company assigned to Peter Osmond and A. M. Thorsen, trustees, their title to any money on deposit in said bank as inducements and subscriptions to the building of said railroad, by which assignment they directed defendant to pay said money to Osmond and Thorsen as trustees; that "on, to-wit, the 15th day of January, 1916," Osmond and Thorsen, as trustees, by their instrument in writing, assigned to plaintiff their title to said funds, whereby said sums of money became due from defendant to plaintiff, and that by these facts defendant became indebted to plaintiff, and that from thence hitherto defendant has held said money for the use of the plaintiff, etc.

It is obvious that the condition named in the order above set out might never have been performed. Therefore said order is not a negotiable instrument at common law or under the law merchant, because to make it negotiable it must be payable either at a time stated or at a time capable of being ascertained and sure to occur. *Kingsbury v. Wall,* 68 Ill. 311; *Van Zandt v. Hopkins,* 151 Ill. 248. Sections 1 and 4 of the Negotiable Instruments Law of 1907 (J. & A. ¶¶ 7640, 7643). Said section 4 provides "an instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

As this instrument was not negotiable prior to the adoption of our Practice Act of 1907, the equitable owners of said instrument could only sue thereon and recover in the name of the payee of that instrument. By section 18 of the present Practice Act (J. & A. ¶ 8555), the assignee and equitable and bona fide owner of a chose in action not negotiable may sue thereon in his own name, but he is required to state in his pleading on oath or by his affidavit, where pleading is not required, that he is the actual bona fide

owner thereof, and to set out how and when he acquired title. There is an affidavit attached to this additional special count, but it is only to the effect that affiant is the agent of plaintiff; that plaintiff's demand is for money had and received by defendant for the use of plaintiff; and that a certain sum is due from defendant to plaintiff. Said count did not allege that plaintiff is the actual bona fide owner of said chose in action, and if there is any allegation which can be so construed, it is not under oath. There is no allegation under oath how plaintiff acquired title nor when he acquired title, nor does the affidavit state that the allegations of the declaration are true, except as above stated. Moreover, the statement in the declaration of the date when plaintiff became the assignee of said instrument is laid under a *videlicet*. The effect of that allegation is to relieve plaintiff of any duty to prove that precise date, but any other date may be proved thereunder. *Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434; *Steele-Wedeles Co. v. Shoodoc Pond Packing Co.*, 153 Ill. App. 576; *Harrison v. Thackaberry*, 154 Ill. App. 246; *Columbian Three Color Co. v. Ætna Life Ins. Co.*, 183 Ill. App. 384. It is obvious that to permit the pleader to set forth one date when he acquired title to the chose in action and to prove a different date would defeat the purpose of the statute. It is clear that plaintiff made no attempt to conform to said statute in any respect. It cannot recover under that statute in its own name as assignee of said chose in action. *Leemon v. Grand Crossing Tack Co.*, 187 Ill. App. 247; *Edwards & Bradford Lumber Co. v. Bontjes*, 193 Ill. App. 392.

Plaintiff contends that it can recover, because this is money which equitably belongs to the plaintiff and which the defendant ought not to retain. If that principle can be sustained, it entirely destroys the long established doctrine that the assignee of a chose in

action cannot recover thereon in his own name, and also destroys the effect of said recent statute, permitting such a recovery under certain circumstances. We are of opinion that the rule so relied on is not applicable to this case.

The judgment is therefore affirmed.

Affirmed.

The People of the State of Illinois ex rel. Edward Kelly, Appellee, v. Maude A. Knoll, Town Clerk, Appellant.

Gen. No. 6,318.

1. INTOXICATING LIQUORS, § 6*—*when presumed that addresses of signers of petition for local option election correct.* Where the residence addresses of the signers of a petition for a local option election are in the appropriate column and the supporting affidavits state that such addresses are correct, it will be presumed that such addresses are correct.

2. INTOXICATING LIQUORS, § 6*—*when given addresses of signers of petition for local option election sufficient.* Where a petition for a local option election by the inhabitants of a town lying wholly in a farming community contains in the appropriate column the addresses of the inhabitants as in the designated town, county and State, it is sufficient in such respect, and it is unnecessary that the signers designate the particular pieces of land on which they reside.

3. MANDAMUS, § 190*—*when judgment not reversed because moot case.* A judgment awarding a peremptory writ of mandamus to compel a town clerk to submit the local option question to the voters will be affirmed, where the judgment was right and the enforcement was prevented by the respondent until after the election was held.

Appeal from the Circuit Court of Lake county; the Hon. CLAIRE C. EDWARDS, Judge, presiding. Heard in this court at the April term, 1916. Affirmed. Opinion filed August 10, 1916.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

BENJAMIN H. MILLER, PAUL MACGUFFIN and F. B. EBBERT, for appellant.

JAMES G. WELCH, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On February 1, 1916, a petition was filed with Maude A. Knoll, town clerk of the Town of Vernon, in the County of Lake and State of Illinois, asking her to cause to be submitted in the manner provided by law to the voters of that town at the next election, the proposition: "Shall this Town Continue to be Anti-saloon Territory?" Objections were filed with her to the submission of said matter, and she refused to submit it. Thereafter, on March 11, 1916, a petition was filed in the name of the People on the relation of Edward Kelly against said town clerk for a mandamus requiring her to cause said question to be submitted to the voters of that town at the next election. She was summoned and demurred to said petition and the demurrer was sustained. The petition was amended and the same demurrer was again filed to said petition, and that demurrer was overruled. She elected to abide by the demurrer and a peremptory writ of mandamus was awarded, and from that judgment she prosecutes this appeal.

While the demurrer is special and lengthy, yet the substance of it is that the petition for the submission of said question was invalid because there was not written opposite the signature of each legal voter who signed said petition a sufficient residence address as provided by law, and the sufficiency of the petition in that particular is the only question presented for decision. Section 4 of the act concerning anti-saloon territory (J. & A. ¶ 4640) requires that the petition for the submission of such a proposition shall consist of sheets

having a certain form at the head thereof, and signed by the legal voters, and it requires that "opposite the signature of each legal voter shall be written his residence address (stating the street and house number if there be such)." It is there provided that no signature shall be valid or be counted in considering the petition unless these requirements are complied with; and also that at the bottom of each sheet shall be added a statement signed by a resident of the county with his residence address as aforesaid, stating, among other things, that the respective residences of the signers are correctly stated therein. Upon the petitions so presented to the town clerk, under the heading "Town, City or Village," "House Number," "Street," was written opposite the name of each signer, "Town of Vernon, County of Lake, State of Illinois." At the bottom of each sheet was an affidavit by a person, a resident of the county, giving his address as the "Town of Vernon in the County of Lake and State of Illinois," and stating, among other things, that the respective residences of the signers are correctly stated in the foregoing petition. The amendment to the petition said that there is no incorporated village or city in the said Town of Vernon, and that no signer of said petition resides or did reside upon any official street or at any number on any official street. The contention of appellant is that this petition did not sufficiently comply with the statute requiring that opposite each name should be stated the "residence address" of the signer. *People v. Newell,* 49 Colo. 349, is relied upon by appellant in support of her position. We do not think that when carefully read it supports her contention. Under the statute there in force it was required that opposite each signature should be his residence address. Certain signers wrote after their names the figures and words, "533 Pratt," and many others writing after them wrote ditto marks

under said address. There were other addresses and names written opposite other signatures, and beneath them other signatures with ditto marks. Some persons wrote the word "section," or the abbreviation "Sec." with a number written thereafter. The signatures were held proper and sufficient and the petitions were held sufficient. There was a suggestion there that a person might have as a residence address "The Elms," "Wolhurst," or "Sagamore Hill," and the like. That case holds that the purpose of the law is to enable any one interested to ascertain whether the signer actually lives at the address given and thus to prevent fraud. It was there held that there was opposite the name of each signer in the column prescribed for that purpose what purported to be the residence address or a ditto mark under such address; that the affidavit said that the addresses so written were the signers' correct residence address; and that the court must presume that the figures and words opposite the respective names were the correct residence addresses of the signers of the petitions; and that the court could not take judicial notice of what constitutes a correct residence address. So here, the residence address being stated in the correct column and the affidavit being in the correct form, it is not for the courts to say that it is not the correct residence address. There is no claim in this case that there was any place where any signer lived that had any distinctive name like "The Elms," or "Sagamore Hill." Reliance is also had upon *State ex rel. Czerny v. Superior Court of King County*, 70 Wash. 592. There a large number of signers did not give the name of the street upon which they resided, and it was held that the statute meant that they should give the street name upon which they lived, if they did live upon a street, even if their house had no number. The case of *State ex rel. Quillen v. Superior Court of Lewis County*, 70 Wash. 343, is in point. There the statute

required opposite the name of the petitioner the name of the precinct in which he resided, his post office address, the street and house number, if any. The signers stated that they were qualified electors of the Town of Winlock, County of Lewis and State of Washington, and in the space underneath the column provided for "Post office address," "Ward," "Precinct," "House No., if any," they only wrote, "Winlock, Wn." There was, in fact, but one election precinct in that town. It was held that the address given was sufficient. In the case at bar, it is suggested by the appellant, that they might have stated the section in which they lived, or even the half or quarter section, and that they could have in some way designated the highway upon which the signer lived, or have given some description of the part of the town in which he could be found. These suggestions might well be addressed to the Legislature, but in a town lying wholly in a farming community where there are no cities or villages it is very seldom that any highway has a street name; and to require them to state the particular piece of land upon which they lived would be judicial legislation. We are of opinion that these signers gave all the "residence address" which they could reasonably be required to give under the statute in question. It is not claimed that the petition was defective in any other respect. We are of opinion that the peremptory writ of mandamus was properly awarded. The time for holding the election was passed before the case reached this court, but inasmuch as the judgment was right and its enforcement was prevented by appellant until after the election was held, it is proper that we affirm that judgment, as was done in *People v. Dillon*, 266 Ill. 272. The judgment is therefore affirmed.

Affirmed.

CASES

DETERMINED IN THE

THIRD DISTRICT

OF THE

APPELLATE COURTS OF ILLINOIS

DURING THE YEAR 1915.

National Cash Register Company, Defendant in Error, v. Ralph Jibben, Plaintiff in Error.

(Not to be reported in full.)

Error to the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1911. Writ of error quashed. Opinion filed October 13, 1915.

Statement of the Case.

Action of replevin by National Cash Register Company, plaintiff, against Ralph Jibben, defendant. An appeal had been taken and judgment rendered affirming the judgment of the lower court against the defendant. Defendant seeks by writ of error to have the same judgment of the lower court reversed.

O. A. SMITH, for plaintiff in error.

PRETTYMAN, VELDE & PRETTYMAN, for defendant in error.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 408*—*when judgment on appeal res judicata.* Where an appeal has been prosecuted the judgment thereon is *res judicata*, not only as to all errors assigned, but also as to all errors that might have been assigned, and it is immaterial whether the judgment is affirmed on the merits or for other reasons.

2. APPEAL AND ERROR, § 22*—*when writ of error does not lie.* Where a final judgment affirming the judgment of the lower court was entered on appeal, the unsuccessful party cannot again review the same judgment and reverse it upon a writ of error.

3. JUDGMENT, § 373*—*what is effect of final judgment on appeal.* The final judgment of the Appellate Court on appeal, affirming the judgment of the trial court, cannot be varied, explained or modified by parol.

National Croation Society of the United States of America, Appellee, v. Mary Pavlic, Appellee, and Veronika Pavlic. Jurs Pavlic, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915. Rehearing denied December 11, 1915.

Statement of the Case.

Bill of interpleader by National Croation Society of the United States of America, complainant, against Mary Pavlic, widow of Kresimir Pavlic, and Jurs Pav-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

lic and Veronika Pavlic, father and mother of Kresimir Pavlic, defendants, to determine the right to the proceeds of a policy of insurance on the life of Kresimir Pavlic. From a decree in favor of defendant Mary Pavlic, after the overruling of a motion by the other defendants to set aside a judgment by default, defendant Jurs Pavlic appeals.

W. J. REARDON, for appellant; W. B. COONEY, of counsel.

McCORMICK & MURPHY, for appellees.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 146*—*when affidavit in support of motion to set aside default insufficient.* An affidavit in support of a motion to set aside a judgment by default, *held* insufficient where it appeared that the affiant had a power of attorney to represent the party and he delayed more than one month, after he learned of the institution of the suit, to represent the interests of the party.

2. INSURANCE, § 827*—*how change of beneficiary made.* Where an insured had the right to change the beneficiary and he did all that he could to make such change, by writing to the lodge in another State, where his certificate was, that he wanted to make such change and to send the certificate to a lodge in the town where he was living, and wrote the secretary of the local lodge to make such change and to find the certificate for him, but the certificate was not obtained, *held* that the change must be deemed to have been made.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Charles D. Johnson, Plaintiff in Error.

(Not to be reported in full.)

Error to the County Court of McLean county; the Hon. HOMER W. HALL, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Charles D. Johnson, defendant, for selling intoxicating liquor in violation of the Local Option Law (J. & A. ¶ 4637 *et seq.*). From a judgment of conviction, defendant brings writ of error.

There was ample evidence that the defendant sold a malt liquor containing various percentages of alcohol called "Temp Brew." It was contended that the court erred in giving certain instructions on behalf of the People, which in substance, told the jury that the words "Intoxicating Liquor" include all distilled, spirituous, vinous, fermented and malt liquors, regardless of whether said liquors would, as a matter of fact, produce intoxication. The plaintiff offered several instructions, which were refused by the court, stating, in substance, that the burden was upon the prosecution to prove beyond all reasonable doubt that he sold liquor which was, in fact, intoxicating, and the refusal to give them was also assigned as error.

QUINN & QUINN, HEYL & MCGRATH and D. J. SAMMON, for plaintiff in error.

MILES K. YOUNG, for defendant in error; W. B. LEACH, of counsel.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

City of Decatur, while the judgments from which the writs of error were prosecuted from this court were obtained by prosecutions under the statute. The above case is referred to for these stipulations.

The only question involved in these writs of error was whether the several defendants in error were guilty of violating said act by means of shifts and devices.

CHARLES C. LE FORGEE and VAIL & MILLER, for plaintiffs in error.

JESSE L. DECK and CHARLES F. EVANS, for defendant in error.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 80*—*when defendants guilty of violating Local Option Law by shifts and devices.* On prosecutions for selling intoxicating liquor in violation of the Local Option Law (J. & A. ¶ 4637 *se seq.*), all the writs of error being consolidated, *held*, following *City of Decatur v. Schlick*, 269 Ill. 181, that the defendants were guilty of violating such act by means of shifts and devices.

2. COURTS, § 150*—*when opinion of Supreme Court on same facts binding.* The decision of the Supreme Court upon the same facts involved in a criminal prosecution is *res judicata* and binding on the Appellate Court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Michael Elliott and Otho Jennings, Plaintiffs in Error.

(Not to be reported in full.)

Error to the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois, plaintiff, against Michael Elliott and Otho Jennings, defendants, for selling intoxicating liquor in anti-saloon territory and for keeping a place where intoxicating liquor was sold, in violation of the Local Option Law (J. & A. ¶ 4637 *et seq.*). From a judgment of conviction, defendants bring error.

The Town of Decatur by a vote of the People on the 7th day of April A. D. 1914, became dry territory. The evidence for the People showed conclusively that the defendants, who had been in the saloon business before the town became dry territory, continued to run their dramshop in the City of Decatur within said town openly for a long period of time thereafter. The defendants did not testify themselves, nor offer any evidence, and made no defense whatever. The court imposed the minimum fine and the minimum jail sentence under each count against each defendant, and it was urged that the aggregate punishment was excessive.

In entering judgment the court ordered and adjudged, in substance, that the defendant Otho Jennings make his fine unto the People of the State of Illinois, in the sum of twenty dollars on each of the first seventy counts, and that he make his fine unto the People of the State of Illinois in the sum of fifty

dollars on the last, or seventy-first count, of the said indictment; that he be confined in the common jail of Macon county for a period of 10 days on each of the first seventy counts of said indictment; that he be confined in the common jail of Macon county for a period of 20 days on the last, or seventy-first count, of the said indictment; that the jail sentences imposed herein run consecutively, making a total of 720 days in jail; that he stand committed until said fine and costs are fully paid, or until he shall be otherwise discharged according to law. Substantially the same form of judgment was entered as to the defendant Michael Elliott.

J. C. LEE and FRED HAMILTON, for plaintiffs in error.

JESSE L. DECK and CHARLES F. EVANS, for defendant in error.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 161*—*when punishment not excessive.* On a prosecution for selling intoxicating liquor in anti-saloon territory and for keeping a place where intoxicating liquor was sold, in violation of the Local Option Law (J. & A. ¶ 4637 *et seq.*), a judgment imposing the minimum fine and minimum jail sentence under each count fixed by statute against each defendant, *held* not excessive.

2. INTOXICATING LIQUORS, § 161*—*when judgments proper in form.* On a prosecution for selling intoxicating liquor in anti-saloon territory and for keeping a place where intoxicating liquor was sold, in violation of the Local Option Law (J. & A. ¶ 4637 *et seq.*), judgments held proper in form.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George P. Van Cleave, Appellant, v. P. H. Fitzsimmons and Katie E. Knox, Appellees.

(Not to be reported in full.)

Appeal from the County Court of Macon county; the Hon. O. W. SMITH, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded with directions. Opinion filed October 13, 1915.

Statement of the Case.

Action by George P. Van Cleave, plaintiff, against P. H. Fitzsimmons and Katie E. Knox, defendants, on two promissory notes. A judgment by confession had originally been taken in vacation, but at a later term of court, on motion of defendants, the judgment was opened up and defendants given leave to plead. From a judgment in favor of defendants after overruling of a demurrer to a special plea, plaintiff appeals.

REDMON & HOGAN, for appellant.

J. C. LEE, for appellees.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. USURY, § 47*—*how to be pleaded.* It is not sufficient to plead in general terms that a transaction is usurious, but the facts constituting the usury must be set forth.

2. USURY, § 48*—*when insufficiently pleaded.* In an action on two promissory notes, a special plea averring that the supposed promissory notes in said declaration mentioned were for the payment of interest at a greater rate than is allowed by law, that they were not taken nor received by the plaintiff in the usual course of trade, and that the plaintiff, at the time he received the said notes under the indorsement thereof to him, well knew the consideration of the making, executing and delivering of the same, *held* insufficient as a plea of usury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Appellee, v. William Coleman, Jr., Appellant.

(Not to be reported in full.)

Appeal from the County Court of Jersey county; the Hon. HARRY W. POGUE, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Bastardy proceedings by the People of the State of Illinois, plaintiff, against William Coleman, Jr., defendant. From a judgment for plaintiff on a verdict of the jury finding defendant to be the father of the bastard child of Ora Tucker, defendant appeals.

On August 26, 1914, Ora Tucker filed her complaint before the justice of the peace charging, "that on or about the —— day of April, 1914, the crime of bastardy was committed in said county, and named defendant as guilty of said crime." The child was born October 28, 1914, and the prosecutrix testified that the acts of intercourse which caused her condition took place on the evening that she attended a show with defendant at the Modern Woodmen hall in the Town of Fidelity, which was on the last Wednesday in January, 1914, and also on the following Sunday evening. Defendant admitted in his testimony to having had many acts of intercourse with the prosecutrix, but that she having positively testified as to the particular dates when such acts took place which caused her condition that she must prove those acts as of such particular dates, and as the preponderance of the evidence showed that he was not with her in Fidelity at those times, the verdict was contrary to the evidence. The prosecutrix was corroborated in her testimony in this regard by several witnesses who were at least as disinterested as those who testified for defendant.

It was further contended that as the complaint charged that the acts of intercourse took place in April, 1914, and as the prosecutrix testified on the trial that they were committed in January, 1914, defendant was taken by surprise, and did not have sufficient opportunity for procuring evidence to contradict her testimony, and in support of the motion for a new trial, affidavits were filed by several officers of the Fidelity Camp of the Modern Woodmen to the effect that no entertainment of any kind was given in the Modern Woodmen hall on behalf of the Modern Woodmen on the evening of the last Wednesday in January, 1914, and one affidavit stated that no entertainment of any kind was given on behalf of said camp in said hall on any night during said month of January. But it appeared that said hall was also used by a society known as the Royal Neighbors of America, and the affidavit did not state, and no affidavit was filed, stating that there was not in fact an entertainment given on behalf of the Royal Neighbors of America in said hall, or one given under some other auspices, on some night during the month of January.

FERNS & SUMNER, for appellant.

W. J. CHAPMAN, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. BASTARDS, § 33*—*when question whether defendant was with prosecuting witness at times claimed for jury.* In bastardy proceedings, where the evidence was conflicting as to whether defendant was with the prosecuting witness at the times claimed by the latter, *held* that such question was for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Woods v. Bowman et al., 200 Ill. App. 612.

2. BASTARDS, § 19*—*when exact day of intercourse immaterial.* It is immaterial, in bastardy proceedings, on what particular days alleged acts of intercourse took place, if, in fact, the defendant is the father of the bastard child.

3. NEW TRIAL, § 99*—*when affidavit in support of new trial on ground of surprise insufficient.* In bastardy proceedings where the complaint charged that the acts of intercourse took place at a certain time, but the prosecutrix testified that they took place three months earlier, affidavits in support of a motion for new trial on the ground of surprise, *held* insufficient.

L. M. Woods, Appellee, v. James N. Bowman and Samuel Hardin. James N. Bowman, Appellant.

1. TRIAL, § 168*—*when character of relationship question for court.* Where the facts are undisputed, the existence of the relationship of master and servant or bailor and bailee between two persons is a question for the court.

2. BAILMENT, § 3*—*when garage man bailee for hire.* A garage man who receives an automobile for repairs from the administrator of an estate, so that it may be in proper condition for a public sale, is a bailee for hire, and not a servant.

3. MASTER AND SERVANT, § 1*—*who is servant.* A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling, and who remains entirely under the control and direction of the latter.

4. MASTER AND SERVANT, § 1*—*when garage man not servant.* A garage man who receives an automobile for repairs from the administrator of an estate, so that it may be in a proper condition for public sale, is not a servant, but a bailee for hire.

5. BAILMENT—*when bailor not liable for acts of bailee.* A bailor is not liable to third persons for injuries received through the negligence of the bailee.

6. AUTOMOBILES AND GARAGES, § 2*—*when administrator not personally liable to third person for negligent act of garage man.* An administrator of an estate who hires a garage man to repair automobiles belonging to the estate for the purpose of a public sale,

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

being a bailor, is not personally liable to a third person for personal injuries caused by the garage man while returning from the premises belonging to the estate, where he had delivered a repaired car, in one of such cars, for the purpose of taking out another repaired car to such premises.

7. TORTS, § 32*—*when joint judgment void as to both wrongdoers.* A joint judgment which is invalid as to one wrongdoer is void as to the other.

8. APPEAL AND ERROR, § 1802*—*when cause reversed and remanded.* Where a joint judgment is void as to one wrongdoer because invalid as to the other, it must be reversed as to both and the cause remanded.

Appeal from the Circuit Court of Christian county; the Hon. JAMES C. MCBRIDE, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 13, 1915. Rehearing denied December 11, 1915.

C. H. SHAMEL and R. C. NEFF, for appellant.

J. E. HOGAN and J. A. MERRY, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Appellee recovered a judgment in the sum of $1,800 against James N. Bowman, appellant, and Samuel Hardin, in an action on the case for damages for personal injuries received by him from being hit by an automobile driven by said Hardin belonging to the estate of John Bowman, deceased, of which James N. Bowman, appellant, was administrator. The original declaration made James N. Bowman a party defendant as administrator of said estate. This was subsequently amended so as to make appellant Bowman a party defendant in his own proper person and not as such administrator. Bowman alone prosecuted this appeal.

Many assignments of error have been presented in the argument of counsel for appellant, but from the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

view we take of the case but one will be necessary to be noticed as it will dispose of the others.

The evidence shows that John Bowman in his lifetime was a farmer, living about a mile and a half west of the Village of Stonington. He was a bachelor, and upon his death his cousin, James N. Bowman, appellant, was appointed administrator of his estate. Among other items of personal property owned by the deceased at the time of his death were five automobiles. Appellant, as such administrator, took possession of the personal property and advertised the same, including these automobiles, for sale at an administrator's sale, held on the 3rd day of November, A. D. 1913. In order to prepare these automobiles for the sale, appellant Bowman, as administrator, made an agreement with his codefendant, Hardin, who ran a garage, to go out to the farm, get the cars, take them to the garage, repair them and return them to the farm for the sale. On the morning of the day of the sale, Hardin and his assistant began taking the cars from the garage to the farm. The method pursued was as follows: The assistant would drive one of the cars to the farm and Hardin would follow him with another car so as to bring back the assistant. Several cars had been delivered in this manner, and it was while Hardin was returning with his assistant in one of the cars in order to take out another car that the accident happened. There were many people, including appellee, walking along the highway to the farm for the purpose of attending the sale, and it is charged in the declaration that Hardin so negligently drove the car that he caused it to strike appellee producing the injuries complained of.

The theory of appellee on which he bases his claim of liability against appellant Bowman is, that Hardin was the servant and employee of Bowman and that the latter was therefore responsible for Hardin's negli-

gence. It is the contention of appellant that the relation of bailor and bailee existed between him and Hardin, and that as bailor he was not responsible for the bailee's negligence. It is first insisted by appellee that it was a question of fact for the jury to determine from the evidence, whether there was created the relation of bailor and bailee, or master and servant. This might ordinarily be true if there was any conflict of evidence upon these propositions, or if there was any evidence tending to show that the relation of master and servant existed. But the facts in regard to these questions are as have been heretofore stated herein, and are undisputed. Whether a certain uncontroverted state of facts creates the relation of master and servant or that of bailor and bailee is a question of law.

When a garageman receives an automobile for repairs to be made for the mutual benefit of the owner and the repairer he becomes a bailee for hire. *Ford Motor Co. v. Osburn,* 140 Ill. App. 633. A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who remains entirely under the control and direction of the latter. Appellant had no control over Hardin, nor did he give any directions as to what repairs should be made, nor how they should be done. Hardin was engaged in the independent calling of running a garage and making repairs on automobiles. He was not in any sense the employee of appellant. Appellant contracted with him to take the cars from the farm to the garage, repair them, return them to the farm, and demonstrate them at the sale, and it was while Hardin was fulfilling that part of the contract of returning the cars to the farm that the injury happened. That a bailor is not liable to third persons for injuries received through the negligence of a bailee is well settled. *McColligan v. Pennsylvania R. Co.,* 214 Pa. 229.

The decisions are substantially unanimous in holding that an owner of an automobile is not responsible for injuries to third persons caused by the negligence of bailees, of servants using said cars for their own personal pleasure, or business, or of persons over whom the owner had no control. Thus it was held in the late case of *Segler v. Callister*, 167 Cal. 377, that the owner of an automobile who had delivered it to a mechanic to repair was not liable for personal injuries resulting to a third person from a collision due to the negligence of the mechanic while testing the car in the due performance of his work by operating it on a public street.

In the case of *Woodcock v. Sartle*, 84 Misc. (N. Y.) 488, 146 N. Y. Supp. 540, it was held that a mechanic engaged by the owner of an automobile to repair his car on his premises at a specified sum per week was an independent contractor, it appearing that the repairs were left entirely to his judgment, and that the owner was not liable for an injury to a third person which occurred through the negligent operation of the car while the mechanic was testing it.

In the case of *Hartley v. Miller*, 165 Mich. 115, it was held that the owner of an automobile riding in his own car, but as the guest of a person who had borrowed and was driving the machine, was not liable to a third person injured by the driver's negligent operation thereof. See also, note 51 L. R. A. (N. S.) 772.

From the undisputed facts shown by the record in this case there can be no liability against appellant Bowman, and as he alone perfected an appeal, it is unnecessary to decide any of the other questions raised; but as the judgment is against him and Hardin jointly, it must be reversed as to both and the cause remanded. *South Side El. R. Co. v. Nesvig*, 214 Ill. 463; *Seymour v. O. S. Richardson Fueling Co.*, 205 Ill. 77; *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.*, 160

Ill. 288; *Claflin v. Dunne*, 129 Ill. 241; *Jansen v. Varnum*, 89 Ill. 100. The judgment is reversed and cause remanded.

Reversed and remanded.

The People of the State of Illinois, Appellee, v. Jasper Tice et al., Appellants.

1. BASTARDS, § 4*—*what is nature of action.* Proceedings under the Bastardy Act (J. & A. ¶ 703 *et seq.*) are criminal in form, but the action itself is a civil one, and is intended to compel the putative father to contribute to the support of his illegitimate child.

2. BASTARDS, § 50*—*what is nature of bond.* A bond given under the provisions of the Bastardy Act (J. & A. ¶ 703 *et seq.*) is a civil obligation given to secure the payment of a debt.

3. BASTARDS—*when surety on bond not discharged.* The rule that a surety on a recognizance in a criminal case is absolved from any liability thereon by the death of the principal has no application to a bond given under the Bastardy Act (J. & A. ¶ 703 *et seq.*), as the bond is a civil obligation given to secure the payment of a debt.

4. STATUTES, § 212*—*when presumed that Legislature did not intend to release sureties on bond upon death of bastard's father.* It must be presumed that the Legislature, because of the fact that in sections 14, 15, of the Bastardy Act (J. & A. ¶¶ 716, 717) are enumerated events which shall render the bond for the support of the child void, not including the death of the putative father, intended that the death of the principal should not have the effect of releasing the sureties on the bond.

Appeal from the County Court of Brown county; the Hon. W. Y. BAKER, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

J. F. REGAN and R. E. VANDEVENTER, for appellants.

O. T. BRIGGS, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Albert Tice was found to be the father of the bastard child of Agatha Wagner by the County Court of Brown county, Illinois, at its January term, A. D. 1914, and was ordered by the judgment of said court to pay to the clerk thereof the sum of $100 for the first year after the birth of said child, and $50 per year for nine years thereafter, said payments to be in equal quarterly instalments and to be paid on the 19th day of the months of December, March, June and September respectively of each year, for the support, maintenance and education of such child, and it was also ordered that he be required to give a bond with sufficient surety to be approved by the judge of said court in the penal sum of $800, conditioned for the due and faithful payment of said sums to the clerk of said court. The bond was executed by said Albert Tice, as principal, and by Jasper Tice and John Craven, as sureties thereon. Agatha Wagner, on November 27, 1914, filed her petition in said court alleging the facts above stated, and further, that said Albert Tice paid the first three instalments of $25 each as ordered by the court, but that the fourth instalment of $25, which was due September 19, 1914, has not been paid; that said Albert Tice died July 18, 1914, and that said sureties knew of his death and the nonpayment of said fourth instalment, and prays that said sureties may be cited to appear in said court on the 1st day of December, A. D. 1914, and show cause, if any they have, why execution should not be issued against them for the amount of said fourth instalment. Appellants filed their answer to the petition, which admitted all the facts therein, and further alleged that the death of Albert Tice was caused by tuberculosis, and that by reason of his death he was rendered incapable by the act of God from further complying with or performing the terms of said judgment and bond, and that they, as sureties thereon, were therefore relieved and dis-

charged from making any further payments. Upon the hearing the court rendered judgment against appellants for said fourth instalment due September 19, 1914, for the sum of $25, from which judgment this appeal is prosecuted.

The only question involved is: Were the sureties on this bond discharged from their obligations thereon by the death of their principal, Albert Tice? Although proceedings under the Bastardy Act are criminal in form, the action itself is a civil one. *Rawlings v. People,* 102 Ill. 475; *McFarland v. People,* 72 Ill. 368; *Peak v. People,* 71 Ill. 278; *McCoy v. People,* 71 Ill. 111; *Davis v. People,* 50 Ill. 199; *People v. Starr,* 50 Ill. 52; *Allison v. People,* 45 Ill. 37; *People v. Noxon,* 40 Ill. 30; *Mann v. People,* 35 Ill. 467; *Maloney v. People,* 38 Ill. 62; *Holcomb v. People,* 79 Ill. 409. Section 8 of the Act (J. & A. ¶ 710) provides that the order and judgment of the court shall be for the payment of a sum of money in certain instalments for a period of ten years, "for the support, maintenance and education of such child," and that the bond shall be "conditioned for the due and faithful payment of said yearly sum, in equal quarterly instalments." Section 10 of the Act (J. & A. ¶ 712) provides: "The money, when received, shall be laid out and appropriated for the support of such child in such manner as shall be directed by the court; and when a guardian shall be appointed for such bastard, the money arising from such bond shall be paid over to such guardian." Section 11 of the Act (J. & A. ¶ 713) provides that if default be made in the payment of any of the quarterly instalments, a petition for citation and judgment may be rendered for the amount due against the principal and sureties on the bond, and execution shall issue thereon. Section 12 (J. & A. ¶ 714) provides, among other things, that this judgment may be made a lien upon the real estate of the principal and sureties by filing a transcript thereof in the office of the clerk of the Circuit Court. It is clear

from these sections of the statute that an action thereunder, though in form criminal, is essentially of the nature of a civil action, the object being not the imposition of a penalty for an immoral act, but merely to compel the putative father to contribute to the support of his illegitimate child. This is well settled by a great many decisions in this State. *Scharf v. People,* 134 Ill. 240, and cases cited. The rule that a surety on a recognizance in a criminal case is absolved from any liability thereon by the death of the principal has no application to bonds given in accordance with the provisions of this act. In our opinion such a bond, given under the provisions of the Bastardy Act, is a civil obligation given to secure the payment of a debt.

Keeping in mind that the bond is conditioned for the due and faithful payment of a certain sum of money in instalments for a period of ten years for the support, maintenance and education of the child, it is necessary to ascertain in what instances the sureties may be discharged from their obligations. The statute itself enumerates the circumstances which will avoid the bond. Section 14 (J. & A. ¶ 716) provides that the bond shall become void if the child shall not be born alive, or, being born alive, shall die at any time. Section 15 (J. & A. ¶ 717) provides that the bond shall become void if the mother and reputed father shall at any time after its birth intermarry. The statute having thus enumerated in what events the bond shall become void, and having omitted to include in such enumeration the death of the reputed father, as a rule of statutory construction it must be presumed that the Legislature did not intend that his death should have the effect of releasing the sureties on the bond.

In our opinion the judgment of the County Court is right and it is therefore affirmed.

Affirmed.

The People of the State of Illinois ex rel. Sam D. Price, Appellee, v. C. A. Askins, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Action of mandamus by the People of the State of Illinois *ex rel.* Sam D. Price, petitioner, against C. A. Askins, respondent, to compel respondent to turn over the books, funds, etc., held by him as school treasurer. From a judgment against respondent, an appeal was taken.

Respondent was school treasurer of Township 10, Range 3 East of the third principal meridian in Shelby county, Illinois. It appeared from the record that the trustees of said school district met on April 11, 1914, for the purpose of electing a president and treasurer. At this time respondent was holding the office of treasurer, having been appointed thereto by the old board. The record of the meeting was as follows: "State of Illinois, Shelby County, ss. April 11, 1914.

"Trustees of Schools of Township Ten (10), Range Three (3) met at No. 6 School, District No. 47, directly after the election of trustee, and proceeded to organize by electing H. M. Archey, president of the Board of Trustees.

"S. A. D. Howe nominated C. A. Askins for treasurer of the board for the ensuing term.

"J. F. Banning nominated Sam D. Price.

"H. M. Archey decided the nomination by favoring Sam D. Price for treasurer for the coming term."

The record of this meeting was written up by respondent as clerk of said board. The relator, Sam D. Price, was not at the meeting of the board, but, upon being notified subsequently of his election as

treasurer, executed a bond in proper form, which was approved by each member of the board, and delivered it to the County Superintendent of Schools, who indorsed thereon: "Received, approved and filed in my office May 4, 1914. Lee W. Frazer, County Superintendent." Thereafter the relator made a written demand upon respondent to turn over to him the school funds, books and properties as treasurer of said school district. This respondent refused to do.

The principal contentions of respondent were: First, that the record of the meeting did not show that the relator was elected treasurer; second, that the record of the meeting not having been signed by the president and clerk of the board of trustees, it was not authenticated and should not have been received in evidence; and third, that there was no proper approval of the bond of the relator by the County Superintendent of Schools.

GEORGE B. RHOADS, for appellant.

WHITAKER, WARD & PUGH, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1301*—*when presumed that court heard only competent evidence.* It must be presumed on appeal from a judgment after a trial by a court without a jury that the court considered only competent evidence.

2. APPEAL AND ERROR, § 1414*—*when finding of court not disturbed as unsupported by evidence.* The finding of a trial court will not be disturbed on appeal as unsupported by the evidence where there is sufficient competent evidence in the record to sustain the judgment of the court.

3. OFFICERS, § 35*—*when former school treasurer estopped to claim irregularity in form of record of a meeting.* A former school

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

treasurer, respondent in mandamus proceedings to compel him to turn over the books, funds, etc., of the office, is estopped to complain that the record did not show that relator was elected treasurer in such action, where he, respondent, wrote up the record of the meeting of the board of directors at which relator was elected school treasurer.

4. OFFICERS, § 35*—*when former school treasurer estopped to claim defects in minutes of meeting.* A former school treasurer, respondent in mandamus proceedings to compel him to turn over the books, funds, etc., of the office, is estopped to claim, in such action, that the minutes of the meeting of the board of directors at which relator was elected school treasurer did not constitute a proper record because not signed by the president and clerk as required by law, where he himself acted as clerk and failed to fulfil his duty by signing the minutes.

5. SCHOOLS AND SCHOOL DISTRICTS, § 41*—*what power school trustees have to remove township treasurer.* School trustees have the power to appoint a township treasurer for the term of two years, and to remove him for sufficient cause, and this power of removal requires no formal charge, no notice to the incumbent, no form of procedure, and is not subject to review.

6. SCHOOLS AND SCHOOL DISTRICTS, § 61*—*when bond of school treasurer properly approved.* A bond of an appointed school treasurer which was approved by the board of trustees in due form and approved by the county superintendent by indorsing thereon the words: "Received, approved and filed in my office May 4, 1914. Lee W. Frazer, County Superintendent," *held* properly approved by the county superintendent.

7. SCHOOLS AND SCHOOL DISTRICTS—*when duty of county superintendent to give certificate to appointed school treasurer.* Where a bond of an appointed school treasurer is in proper form, and is duly approved and accepted by the board of directors and county superintendent, it is the duty of the latter to give the treasurer a written certificate that he is such officer, and the fact that such certificate is not given cannot defeat his right to such office.

8. SCHOOLS AND SCHOOL DISTRICTS—*when appointed school treasurer entitled to funds.* An appointed school treasurer, relator in an action of mandamus to compel a former treasurer to turn over the books, funds, etc., of the office, has the prima facie right to the office and is entitled to the funds, etc., where his bond has been duly approved by the board of directors and by the county superintendent, although he has not received a certificate from the school superintendent.

9. MANDAMUS, § 49*—*how title to office may not be tried.* The title to an office cannot be tried in an action of mandamus.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. S. Richey, Appellee, v. State Bank of Latham, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 13, 1915.

Statement of the Case.

Action by W. S. Richey, plaintiff, against the State Bank of Latham, defendant, to recover funds deposited in defendant's bank. From a judgment for plaintiff, defendant appeals.

HUMPHREY & ANDERSON, for appellant.

KING & MILLER, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 74*—*when competent as part of res gestæ.* In an action by a depositor against a bank to recover the balance of proceeds from the sale of property on the farm of which plaintiff was tenant, the entire proceeds of which sale were deposited in defendant's bank, and such balance paid over to the landlord by the bank cashier on the alleged order of the depositor, after satisfaction of a claim of the bank, a question on cross-examination of plaintiff as to whether he owed the bank some money that was taken out of the sale money, *held* competent as part of the *res gestæ*.

2. BANKS AND BANKING, § 118*—*when evidence admissible to show authority of bank to pay out deposit to creditor of depositor.* In an action by a depositor against a bank to recover the balance of proceeds of a farm sale turned over by defendant's cashier to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

plaintiff's landlord, after satisfaction of a claim of the bank, a question on cross-examination whether he did not tell a certain person that all the proceeds of the sale were to be paid or turned over to the landlord, *held* competent as tending to corroborate the testimony of defendant's cashier on the disputed question that plaintiff authorized the cashier to turn over such proceeds.

3. BANKS AND BANKING, § 118*—*when evidence admissible in action by depositor to recover deposit.* In an action by a depositor against a bank to recover the balance of proceeds of a farm sale remaining after the satisfaction of a claim of the bank, and which balance was turned over to the plaintiff's landlord by the bank cashier, but, as plaintiff claimed, without authority, *held* that a question on cross-examination of plaintiff as to whether he did not tell the cashier on the morning of the sale that all the proceeds of the sale were to be turned over to the landlord as a credit on the debt to the latter, *held* competent.

4. BANKS AND BANKING, § 118*—*when evidence admissible in action by depositor to recover deposit.* In an action by a depositor against a bank to recover the balance of proceeds of a farm sale remaining after the satisfaction of a claim of the bank, and which balance was turned over to the plaintiff's landlord by the bank cashier with the claimed consent of plaintiff, a question on cross-examination of the plaintiff if he did not owe the landlord a note about that time for a specified sum, *held* competent.

5. BANKS AND BANKING, § 118*—*when evidence admissible in action by depositor to recover deposit.* In an action by a depositor against a bank to recover the balance of proceeds of a farm sale remaining after the satisfaction of a claim of the bank, and which balance was turned over to plaintiff's landlord by defendant's cashier with the claimed consent of plaintiff, a question on cross-examination of plaintiff if he did not know what notes the landlord held against him, *held* proper.

6. BANKS AND BANKING, § 118a*—*when evidence sufficient to show authority to pay deposit to creditor.* In an action by a depositor against a bank to recover the balance of proceeds of a farm sale remaining after the satisfaction of a claim of the bank, and which balance was turned over to plaintiff's landlord by defendant's cashier with the claimed consent of plaintiff, evidence *held* sufficient to show that plaintiff authorized the payment of such balance to the landlord to be applied on his indebtedness to the latter.

7. BANKS AND BANKING, § 118a*—*when evidence sufficient to show ratification by depositor of payment of deposit to creditor.* In an action by a depositor against a bank to recover the balance

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of proceeds of a farm sale remaining after the satisfaction of a claim due the bank, and which balance was turned over to plaintiff's landlord by defendant's cashier with the claimed consent of plaintiff, evidence *held* sufficient to show that even if plaintiff had not verbally authorized defendant to turn over the balance of such proceeds to the landlord, he had afterwards ratified its action in so doing.

Charles P. Wilson, Appellee, v. Hartford Fire Insurance Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermilion county; the Hon. M. W. THOMPSON, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Action by Charles P. Wilson, plaintiff, against the Hartford Fire Insurance Company, a corporation, to recover for a loss by fire based on an oral contract to renew a policy in force. From a judgment for plaintiff, defendant appeals.

The case was before the court in a former appeal, 188 Ill. App. 181, where it was reversed and remanded on the ground that the declaration was insufficient. More than a year after the loss an additional count was filed.

O. M. JONES and BARGER & HICKS, for appellant; C. O. CARLSON, of counsel.

LINDLEY, PENWELL & LINDLEY, for appellee; WALTER C. LINDLEY, of counsel.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

INSURANCE—*when action may be maintained on oral contract to renew fire policy.* Though a fire insurance policy provided that no recovery could be had thereunder unless an action was commenced within one year after the loss, *held* that a recovery could be had on an oral contract to renew such policy though the action was not commenced within the period named in the policy.

L. L. Butterfield, Appellee, v. Simon Diekman, Appellant.

1. APPEAL AND ERROR, § 269*—*what is final judgment.* A judgment on a motion to quash an execution is a final judgment, and an appeal will lie therefrom.

2. JUDGMENT, § 252*—*when clerk no authority to amend record.* A clerk has no authority, on his own motion, to amend the record of a judgment in vacation.

3. JUDGMENT, § 112*—*when judgment by default sufficient in form.* Where the defendant, in a case appearing upon the judge's docket under its correct number, but with the first name of the defendant incorrect, was defaulted, *held* that the judgment was in fact rendered against the real defendant in the case as appeared in the pleadings.

4. EXECUTION, § 113*—*when special execution should be quashed.* Refusal to quash a special execution issued on a judgment, the record of which had been altered by the clerk of his own volition by changing the first name of the defendant, *held* error.

Appeal from the Circuit Court of McDonough county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded with directions. Opinion filed October 13, 1915.

ELTING & HAINLINE, for appellant.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

VOSE & CREEL and FLACK & LAWYER, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court of McDonough county overruling a motion to quash a special execution issued on a judgment in attachment in favor of appellee.

Appellee instituted his suit in attachment in said court to the May term, A. D. 1914, thereof. The affidavit for attachment and all the papers necessary for the institution of the suit filed in the case named appellant by his proper name, Simon Diekman. The case bore the general number 3329, and when it came to be docketed upon the judge's docket or minute book by inadvertence it was docketed as L. L. Butterfield vs. Charles Diekman. On May 11, 1914, judgment was entered by default and the memoranda appearing upon the judge's minute book are as follows: "No. 3329. L. L. Butterfield vs. Charles Diekman. Dfdt. called—defaulted—evidence heard judg. in attachment against dfdt. in favor of pltf. for $500.00 and costs. Special execution awarded." The clerk, following the entries in the minute book, wrote up the judgment in the record as against *Charles* Diekman, and on August 6, 1914, a general execution was issued against Charles Diekman. After the May term had been adjourned, the clerk, in vacation, attempted to amend the record of the judgment by striking out the word "Charles" and inserting in lieu thereof the word "Simon." He also at the same time procured the general execution which had been given to the sheriff to serve and made similar amendments therein. On September 3, 1914, which was still in vacation, on motion of appellant, the general execution was quashed on the ground that the clerk had no authority to amend it after it had been delivered to the sheriff, and not upon the ground that it should have been a special and not a general

execution. On September 12, 1914, the court still being in vacation, a special execution was issued on said judgment against appellant in his proper name, Simon Diekman. On September 19th, the same being one of the days of the September term of said court, appellant made a motion to quash this special execution, which was overruled, and it is from the judgment overruling this last motion that this appeal is prosecuted.

It is first urged by appellee that a judgment on a motion to quash an execution is not a final judgment and no appeal will lie therefrom. There is a conflict in the decisions of the courts of foreign States and jurisdictions upon this question, but we believe that the principles of right and justice support the theory that an appeal or writ of error will lie from such judgment, because, if they did not, a person would be powerless in a rightful case to save his property from being confiscated by a void legal process. In the case of *Sloo v. State Bank of Illinois*, 1 Scam. (2 Ill.) 428, it was contended that a judgment on a motion to set aside a judgment or to restrain an execution from being issued thereon because the judgment was void was not a final judgment from which a writ of error could be prosecuted. But the Supreme Court held: "The expressions used in the statute defining the jurisdiction of this court, we agree, are not to be extended to give this court cognizance of cases in proceedings or judgments merely interlocutory; but we aver that whenever a decision takes place in any of the Circuit or inferior courts of record of this State, which is final, and of which a record can be made, and which shall decide the right of property or personal liberty, complete jurisdiction is conferred on this court to hear and determine the same. * * * It seems to us, that, if the reasoning of the defendants' counsel was correct, the adoption of his doctrine would

lead to an almost entire subversion of the objects for which this tribunal was created." In the case of *Jenkins v. Merriweather,* 109 Ill. 647, the appeal was taken from the judgment of the Circuit Court in refusing to quash an execution *venditioni exponas,* and while no question seems to have been raised in that case as to whether such judgment was a final one and an appeal could be taken therefrom, yet the Supreme Court assumed jurisdiction of the appeal and decided the matter upon its merits. The fact that the Appellate tribunals of this State do, of their own motions, if none are made for the purpose, dismiss appeals which they have no jurisdiction to entertain, leads to the conclusion that the Supreme Court in assuming jurisdiction of the appeal in the latter case considered that judgment a final one.

It is urged by appellant that the clerk had no authority to amend the record of the judgment in vacation on his own accord. That this is true is too clear for argument. Even the court, after the term has expired, has no power even at a subsequent term to order an amendment to the record in matters of form except upon notice to the parties to the suit and when there are some memoranda, minutes or notes of the judge, or something appearing on the records or files to amend by. *Babcock v. McCamant,* 53 Ill. 214; *Swift v. Allen,* 55 Ill. 303; *Bryant v. Vix,* 83 Ill. 11; *Ayer v. City of Chicago,* 149 Ill. 262. But it is urged that the judgment was, in fact, rendered against Simon Diekman, and that on the authority of *People v. Petit,* 266 Ill. 628, appellee was entitled to his special execution regardless of whether any judgment was actually recorded by the clerk or not. We agree that the judgment was actually rendered against Simon Diekman. This is shown by the minutes made by the judge. The minutes pertaining to the case were made in the case "No 3329," and show that the defendant in that case was defaulted, judgment rendered against him in

favor of appellee, and that a special execution was awarded. These minutes are not the record of the judgment. The judgment would have been just as much a judgment if no minutes thereof had been made at all; but having been made they may be resorted to as a memorandum of what the judgment was. They were made in a case bearing a general number 3329, and it is wholly immaterial that the minutes also contained an incorrect title to the case, or whether they contained any title or not. The minutes are identified with the case having the general number 3329. In the case of *People v. Petit, supra,* which was a mandamus proceeding instituted in the Supreme Court, it appears that the relator, Halbrook, on October 17, 1913, procured a judgment in his favor in an action of assumpsit for $9,500 damages against one Lawton, on which an execution was issued on November 18th. At the time the execution was issued no record of the judgment had been written by the clerk, and on December 4th, Lawton made a motion to expunge the entries of the clerk from the dockets and files in the case, or in alternative, if the court should hold the judgment to be valid, that the judgment for certain alleged errors of fact occurring in the proceedings be vacated and set aside. Upon the filing of the motion the court entered an order staying the execution and forbidding the clerk to spread of record any further orders in the case until further notice. Thereupon the relator, who was the plaintiff in the court below, instituted mandamus proceedings in the Supreme Court to compel the judge to expunge from the record that part of his order forbidding the clerk to spread of record any further orders in the case. The Supreme Court held that it was not necessary to the validity of the execution that the judgment should have been written by the clerk in the court record at the time of the issuance of the execution, and that the judgment existed from the time the court rendered it and not from the

time it was formally recorded upon the record. It was further held that after the lapse of the term at which the judgment was rendered the power of the court over the judgment was gone, and that it could not in any way vacate, modify or interfere with it, and had no authority at that time to order that the judgment rendered at a previous term should not be written in the record. This is the extent of the holding of the *Petit* case, *supra,* in so far as the issues in this case are concerned.

While an execution can be issued on a judgment before the record thereof is made, it is clearly upon the theory that the law presumes that when the record of the judgment is written it will be written correctly and in the same manner that it was made, but after the formal record thereof has been made, then such record is the evidence of the judgment which ordinarily can only be proved by the record. The record, so written, is a finality and cannot be changed, modified or altered by the clerk of his own volition. Judgments are the solemn declarations of the courts adjusting the rights of property and the liberty of the persons of the litigants who come before them, and would have no value if they had no stability. The amended record of the judgment in this case is void, and the special execution issued by virtue thereof is also void and should have been quashed. Appellee should have made a motion to amend the record of the judgment as there is abundant proof in support thereof, and then have his special execution issued on the proper judgment. He can suffer no injury by following such a course as the levy of the attachment writ retains the lien upon the property levied upon.

The judgment is reversed and cause remanded with directions to sustain the motion to quash the special execution.

Reversed and remanded with directions.

Joseph Schlitz Brewing Company, Appellant, v. J. R. Miller et al., Appellees.

INTOXICATING LIQUORS—*when recovery may be had on bond for payment of purchase price of interstate shipment.* Recovery may be had on a bond given to secure a payment of the purchase price of beer shipped by a dealer outside the State to a point within dry territory in the State and consumed there.

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 13, 1915.

CHAFEE, CHEW & BAKER, for appellant.

WHITAKER, WARD & PUGH, for appellees.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

On the 11th day of April, 1910, appellee J. R. Miller, of the City of Shelbyville, Illinois, and the Jos. Schlitz Brewing Company, of Milwaukee, Wisconsin, entered into a written contract in which Miller agreed to handle exclusively the beers of said brewing company for a period of five years at certain stipulated prices free on board cars at Shelbyville, Illinois, to be paid by him to said brewing company. On the back of the agreement was the following: "No order or agreement for the purchase of beer will be considered as binding upon the company until received and accepted at the general office in Milwaukee. All sales of beer, however, ordered, delivered or paid for, are understood and agreed to be made and fully consummated in Milwaukee, Wisconsin. All shipments will be made f.o.b. Milwaukee, and are at the risk of the purchaser from the moment when delivery is made to a regular

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

the rules and regulations printed on the back thereof. The bond contains no reference as to where the beer should be delivered.

The Town of Shelbyville is a township in the county of Shelby which is under township organization, and the City of Shelbyville is situated within the township. On April 7, 1908, the Town of Shelbyville became anti-saloon territory under the Local Option Act. On April 21, 1908, the City of Shelbyville became anti-saloon territory under the same act. On April 7, 1910, the proposition: "Shall the Town of Shelbyville continue to be anti-saloon territory?" was submitted to a vote of the town and a majority voted against the proposition, so that the township ceased to be anti-saloon territory. On May 9, 1910, the City Council of the City of Shelbyville passed an ordinance granting liquor licenses within the city on the theory that the last vote of the township above mentioned which embraced the city within its limits took the city with it out of anti-saloon territory. On May 1, 1911, a license was issued by the city to appellee Miller and saloons were continued to be operated in the city until the opinion in the case of *Stead v. Fortner*, 255 Ill. 468, was rendered in October, 1912. The decision of the Supreme Court in that case held that where a township, and a city within the township, have each voted to become anti-saloon territory, but the township subsequently votes against the proposition to continue to be anti-saloon territory, the township vote does not make the city saloon territory nor authorize the issuance of license or the sale of intoxicating liquor in such city. After the above decision was rendered, appellee refused to pay the balance he owed appellant.

Many cases have been cited by appellee in support of the argument that where the public policy of a State has been declared by a legislative enactment forbidding the sale of intoxicating liquors within its border that a contract for the sale of such liquors is void

and no recovery can be had for the price thereof. But all these cases are by the courts of States that have enacted State wide prohibition laws, and in most of which there are provisions declaring such contracts to be void. We do not think that because the Local Option Law of this State grants certain territorial subdivisions thereof the privilege of making themselves anti-saloon territory that a public policy is thereby declared against the sale of intoxicating liquors within the State. The laws of this State give cities, towns and villages the right to license, regulate, tax and prohibit many trades, pursuits and callings; to illustrate, they have the power to license, tax, regulate, suppress and prohibit hawkers and peddlers. Does such a law declare a public policy of the State against the sale of merchandise to hawkers and peddlers because they might attempt to sell it within territory which has prohibited its sale? The answer is too plain for argument. Whether the contract and bond should be held to have been executed within this State, or within the State of Wisconsin, as this beer was shipped from the latter State into this State it was, as held in the case of *F. W. Cook Brewing Co. v. Vaccaro,* 188 Ill. App. 387, undoubtedly an interstate shipment. But it is urged that section 13 of the Local Option Act above quoted declares that the sale of intoxicating liquor under such contract is an unlawful selling. The answer to this proposition is that in the case of *People v. McBride,* 234 Ill. 146, where the constitutionality of the Local Option Act was involved and attacked on the ground that this section of the act violates the interstate commerce clause of the Federal Constitution, the Supreme Court said: "The act does not purport to control in any manner the importation of liquor from other States." There is no statute in this State prohibiting a recovery upon such a contract, and we are in accord with the views expressed by the court

in the case of *F. W. Cook Brewing Co. v. Vaccaro, supra,* that where intoxicating liquors are imported from another State into this State, as there is no statute prohibiting a recovery, therefore a recovery can be had for the sale thereof. The judgment is reversed and the cause remanded.

Reversed and remanded.

Charles Johnson Hardware Company, Appellant, v. Board of Education of School District No. 96, Fulton County, Illinois, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Fulton county; the Hon. ROBERT J. GRIER, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Bill by Charles Johnson Hardware Company, complainant, against the Board of Education of School District No. 96, Fulton County, Illinois, defendant, to establish a mechanic's lien. From a decree dismissing the bill, the complainant appeals.

The complainant sold material to a contractor, W. H. Gard, engaged in the construction of a public building. It served the following notice on the president of the board of education:

"Peoria, Ill., Nov. 10, 1913.

"Mr. W. H. Gard,
Bought of Chas. Johnson Hardware Co.,
2023 South Adams Street.

"No. 1, Contract Job, Roofing,
Galvd. Iron and Tin

Work and Sky-lights
on Cuba Schools.... 1,160.00
Cr.
"Sept. 15, By Cash..... 500.00 660.00."

H. H. ATHERTON and I. C. PINKNEY, for appellant.

CHIPERFIELD & CHIPERFIELD, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 5*—*how act construed.* The Mechanics' Liens Act must be strictly construed.

2. MECHANICS' LIENS, § 67*—*when notice of mechanic's lien insufficient.* A notice under section 23 of the Mechanics' Liens Act (J. & A. ¶ 7161) by a materialman who had furnished materials to a building contractor, which did not claim any lien for the unpaid balance of its account, did not show what materials were furnished the contractor and did not state that the materials furnished were for the construction of the building in which the lien was sought, *held* insufficient.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Congregation of Bnai Abraham, Appellant, v. Sarah Kanner, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Sangamon county; the Hon. NORMAN L. JONES, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

Statement of the Case.

Action in assumpsit by the Congregation of Bnai Abraham, a corporation, plaintiff, against Sarah Kanner, defendant. From a judgment for defendant, plaintiff appeals.

The action was brought upon the following instrument:

"February 23, 1914.

"I, Sarah Kanner, in consideration of my love and fond memory of my late husband, Isadore Kanner, and in further consideration of the funeral rites performed and to be performed upon my said late husband, hereby promise to pay the present encumbrance upon this congregation, Bnai Abraham, at Seventh and Mason streets, amounting to $1,900.00, within six months from date. I hereby further empower the trustees of the said congregation to enforce my said promise.

"SARAH KANNER.

"Witness."

SMITH & FRIEDMEYER, for appellant.

WILLIAM L. PATTON and THOMAS J. CONDON, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 86*—*when promise to pay off incumbrance unsupported by consideration.* A promise by the widow of a deceased member of a religious congregation to pay off an incumbrance on church property in consideration of funeral rites performed and to be performed upon the deceased, and empowering the trustees of the congregation to enforce the promise, *held* not to be a promise by anybody to anybody, except to the maker thereof, and not founded upon a valid consideration.

Charles Crum, Appellee, v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the County Court of Edgar county; the Hon. DAN V. DAYTON, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinion filed October 13, 1915.

Statement of the Case.

Action by Charles Crum, plaintiff, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, defendant, for damages for failure to furnish proper cars for the shipment of live hogs. From a judgment for plaintiff, defendant appeals.

The declaration alleged that the defendant received from the plaintiff a number of live hogs for shipment from Paris, Illinois to East Cambridge, Massachusetts, and that the defendant failing in its duty to furnish proper cars, the plaintiff was compelled to and did ship them to Indianapolis, Indiana, and suffered damage as the result thereof.

It appeared from the evidence that plaintiff requested defendant to furnish double deck cars for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

these hogs, but that plaintiff was unable to procure double deck cars, but did furnish single deck cars. It did not appear that plaintiff made any protest upon the character of the cars, but accepted the same and shipped his hogs to Indianapolis. Plaintiff testified upon direct examination that he ordered the cars for the purpose of shipping the hogs to East Cambridge, but on cross-examination he stated that he was not sure whether he ordered the cars in order to make the shipment to East Cambridge or to East Buffalo, New York. The records of defendant showed that his order was for cars in which to ship the hogs to East Buffalo, New York. The evidence showed that one carload of hogs was sold in Indianapolis at $9.50, and the second load at $8.95 per hundred pounds. Plaintiff further testified that just before he made the shipments he had telegrams from the J. P. Squire Company, pork packers at East Cambridge, that the price for top hogs at that place was $11.50 per hundred pounds dressed for pork. He also testified that the cost of shipping the hogs to East Cambridge would be about $2.50 or $2.60 per hundred, and that the freight rate was 32½ cents per hundred. A few of the hogs were sold to local parties at Paris, Illinois, for $8.50 per hundred pounds. There was no evidence as to what the hogs weighed at Indianapolis, or whether the price received for them there was for live hogs or for hogs dressed for pork. There was no evidence of the number or weight of the hogs sold at Paris. There was no evidence of any kind in regard to a shipment of hogs to East Buffalo, New York. There was no evidence that the cars furnished were not proper and suitable for the shipment of the hogs to East Cambridge except that of plaintiff himself.

GEORGE B. GILLESPIE, for appellant.

J. K. LAUHER, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 209*—*when cross-examination of witness improper.* Where, in an action by a shipper against a carrier for failure to furnish proper cars, the plaintiff, on being called by the defendant, testified as to the kind of cars he shipped in and that he made no complaint thereof, *held* that allowing him to state on cross-examination that such cars were not of the kind ordinarily used by well-regulated railroad companies for the purpose for which he desired them, and that cars of another kind were usually furnished for such purpose by well-regulated carriers, was improper.

2. DAMAGES, § 190*—*when evidence insufficient as basis for computation of damages.* In an action by a shipper against a carrier for failure to furnish cars suitable for the shipment of live hogs, *held*, that there was no evidence from which the jury could estimate damages.

Harley J. White, Appellee, v. Margaret Holden, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915. Rehearing denied and opinion modified December 11, 1915.

Statement of the Case.

Action of forcible entry and detainer by Harley J. White, plaintiff, against Margaret Holden, defendant. From a judgment for plaintiff, defendant appeals.

MURRAY & MORRISSEY, for appellant.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

M. A. BRENNAN and RALPH HEFFERNAN, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. JUSTICES OF THE PEACE—*when copy may be substituted for lost written complaint on appeal.* If, on appeal from a justice of the peace to the Circuit Court, a written complaint is found to be missing from the files and has been lost or destroyed, upon due proof made thereof, a copy may be substituted therefor.

2. APPEAL AND ERROR, § 1275*—*when presumed that ruling of Circuit Court dismissing case proper.* In the absence of a bill of exceptions, *held* that the action of the Circuit Court in overruling the defendant's motion to dismiss an action of forcible entry and detainer, appealed from a justice's court, on the ground that there was no written complaint on file, would be presumed proper.

Erwin & Maxwell, Appellees, v. R. F. Johnson, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Christian county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1915. Reversed and remanded. Opinon filed October 13, 1915. Rehearing denied December 11, 1915.

Statement of the Case.

Action by Erwin & Maxwell, partners, plaintiffs, against R. F. Johnson, defendant, for commissions for the sale of real estate. From a judgment for plaintiffs, defendant appeals.

W. B. MCBRIDE, E. E. DOWELL and M. J. FITZGERALD, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

JOHN E. HOGAN and JAMES H. SMITH, for appellees.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 275*—*when telegram admissible.* Where the plaintiffs took the initiative in sending the defendant a telegram, *held* that they thereby made the telegraph company their agent, and that the telegram delivered to the defendant could be introduced in evidence as the original.

2. CONTRACTS, § 377*—*when evidence as to existence of contract admissible.* In an action on a contract which one of the plaintiffs testified was verbal, where he admitted that he had received letters from the defendant to the same effect it was *held* that an objection to a question as to where the letters were was improperly sustained, on the ground that it was immaterial.

3. TRIAL, § 45*—*when statement of court improper as invading province of jury.* In an action on a contract, a statement by the court that a conversation detailed by a witness did not amount to an agreement, *held* to invade the province of the jury.

4. BROKERS, § 95*—*when instruction erroneous.* In an action for commissions for the sale of a tract of land where the defense was that commissions for the sale thereof were to be paid only in case a sale was made of another tract, an instruction directing a verdict for the plaintiffs and ignoring such defense, *held* erroneous.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Mabel Ware Anderson, Appellee, v. Decatur Railway & Light Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM K. WHITFIELD, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915. Rehearing denied December 11, 1915.

Statement of the Case.

Action by Mabel Ware Anderson, plaintiff, against the Decatur Railway & Light Company, defendant, for damages for personal injuries. From a judgment for plaintiff, defendant appeals.

CREA & HOUSUM, for appellant; GEORGE W. BURTON, of counsel.

CHESTER A. SMITH, CHARLES F. EVANS and JESSE L. DECK, for appellee.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1401*—*when verdict not disturbed.* In an action for personal injuries sustained as the result of the vehicle in which the plaintiff was riding, on a street car track, being struck by an overtaking street car, evidence *held* to justify the submission of the questions of negligence of the defendant and contributory negligence of the plaintiff to the jury, and not to justify a reversal of the verdict as contrary to the evidence.

2. APPEAL AND ERROR, § 1466*—*when admission of evidence harmless error.* In an action for personal injuries, admission of testimony that a witness heard a remark made which indicated to her that an accident, such as claimed by the plaintiff, had happened,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

held not reversible error, if error at all, there being no controversy as to whether or not such accident had happened.

3. INSTRUCTIONS, § 118*—*when not objectionable as not referring to evidence.* An instruction stating an abstract proposition of law is not objectionable in that it does not refer to the evidence.

4. CARRIERS, § 482*—*when instruction not erroneous.* In view of the evidence, an instruction in an action by a street car passenger for personal injuries, *held* not erroneous as assuming a duty on the part of the motorman to sound a gong.

5. INSTRUCTIONS, § 114*—*when should not be given.* Instructions as to matters not in issue should not be given.

6. NEW TRIAL, § 96*—*when affidavit in support of motion for new trial insufficient.* A new trial in a personal injury action, *held* properly denied on an affidavit stating that the plaintiff's physician, in an interview with the defendant's claim agent, omitted to state the details of the results of the plaintiff's injuries, it not being claimed that, as the result of such omission, the defendant was taken by surprise as to the extent of such injuries, and there being nothing in such affidavit showing that any wilful misrepresentation had been made.

Two Rivers Coal Company, Appellant, v. J. B. Vaughn et al., Appellees.

APPEAL AND ERROR, § 800*—*what bill of exceptions must contain for purpose of review.* A ruling on a motion to quash a writ of certiorari, to review proceedings of the industrial board under the Workmen's Compensation Act [Cal. Ill. St. Supp. 1916, ¶ 5475 (1) *et seq.*], will not be reviewed where it is not preserved in a bill of exceptions.

Appeal from the Circuit Court of Vermilion county; the Hon. M. W. THOMPSON, Judge, presiding. Heard in this court at the April term, 1915. Affirmed. Opinion filed October 13, 1915.

BRADLEY, HARPER & EHEIM, for appellant; SAMUEL A. HARPER, of counsel.

---

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

THOMAS A. GRAHAM, for appellees.

MR. PRESIDING JUSTICE ELDREDGE delivered the opinion of the court.

The appellant filed its petition in the Circuit Court of Vermilion county for a writ of certiorari to review the proceedings of the Industrial Board of the State of Illinois had under the Workmen's Compensation Act of 1913 [Cal. Ill. St. Supp. 1916, ¶ 5475 (1) *et seq.*] in the matter of the application of John L. Billman for compensation under said act. Upon the return of the writ a transcript of all the evidence and proceedings before the committee of arbitration, and also a transcript of the additional evidence and proceedings on appeal to the industrial board from the decision of said committee, was filed in the Circuit Court. An award was made to Billman by the arbitration committee for temporary disability in the sum of $85.50, and for permanent disfigurement to his face in the sum of $463.20. The cause was heard in the Circuit Court upon the motion of appellees to quash the writ and dismiss the petition for certiorari, which motion the court sustained, quashed the writ, and dismissed the petition at petitioner's costs. From the judgment of the court on this motion, this appeal is prosecuted. The record contains no bill of exceptions preserving any exceptions; consequently, there is nothing for this court to review. The rulings of trial courts upon motions generally can only be preserved for review on appeal by bills of exceptions, and this rule applies as well to motions to quash writs of certiorari as to other motions. In the case of *Hersey v. Schaedel,* 6 Ill. App. 188, the court held: "The record in this case contains no bill of exceptions, and although the clerk has recited as a part of the proceedings that a motion to quash the writ was interposed and overruled, and that an exception to such decision was taken, such matters can be made a part of the record,

so as to be subject to review in an Appellate Court only by bill of exceptions."

So also in the case of *LaFevere v. Watson,* 70 Ill. App. 646, the court said: "He brings the case to this court on a writ of error, and assigns for error: 1, that the court erred in overruling plaintiff's motion to quash the writ of certiorari and dismiss the appeal; and 2, that the court erred in rendering judgment for the defendants, and that the judgment should have been for the plaintiff.

"In order to have preserved these questions for the consideration of this court, the plaintiff in error should have saved them in a bill of exceptions, as otherwise there is nothing in the record for us to pass upon. There is no bill of exceptions in the record. The clerk has improperly inserted in the record what purports to be a motion to quash the writ of certiorari, and also a motion for a new trial, but this action of the clerk does not make these alleged motions a part of the record."

For the reasons stated, the judgment of the Circuit Court must be affirmed.

Affirmed.

TOPICAL INDEX, VOL. 200.

ABATEMENT AND REVIVAL.

Pendency of writ of error—when not available to abate similar action. p. 48.
Plea to jurisdiction—what is effect of absence of. p. 280.
—— when insufficient. p. 280.
—— when invalid. p. 280.
—— when not waived. p. 280.

ACCOUNT.

Burden of proof—when on agent on bill by principal for. p. 1.
Master's findings—when evidence sufficient to support. p. 1.
Trustee—who proper parties to bill for accounting against trustee upon death of beneficiary. p. 273.

ACCOUNT STATED.

Evidence—when sufficient to support verdict. p. 63.
Omitted items—when no presumption that item not chargeable. p. 506.

ACTIONS AND DEFENSES.

Interest coupons—when holder of, secured by trust deed, has right of action. p. 509.
Joinder of causes of action—when improper, harmless error. p. 464.
Premature—when action not prematurely brought. p. 501.

ADULTERY.

Evidence—when supports judgment. p. 59.
Information—when not repugnant. p. 59.
Status of paramour—when need not be shown. p. 59.

ANIMALS.

Fence—when evidence insufficient to show destruction by defendant. p. 401.
Ownership—when evidence sufficient to show. p. 339.

Running at large—when allowing constitutes negligence. p. 339.
—— when evidence of custom admissible. p. 339.

APPEALS AND ERRORS.

Abatement—when pendency of writ of error not available to abate similar action. p. 48.
—— when question of raised too late. p. 48.
Abstract—what questions not considered where declaration and verdict not contained. p. 467.
—— when presumed that questions were properly decided in trial court in absence of. p. 260.
Affirmance by operation of law—when results. p. 402.
Appeal—when prematurely taken. p. 55.
Assignment of error—what is effect of failure to assign. p. 301.
—— when errors not reviewed in absence of. p. 496.
Bill of exceptions—how trial judge may refresh recollection for purpose of certifying. p. 556.
—— what cannot be reviewed where matters not included in. pp. 108, 556.
—— what must contain. p. 556.
—— when judge may receive and sign, after term. p. 536.
—— when judicial notice taken of warrant of attorney not set out in. p. 210.
—— when may be presented to trial judge. p. 536.
—— when presumed to have been presented to trial judge before expiration of term. p. 536.
—— when questions not preserved for review. p. 6.
—— when right to file expires. p. 536.
Certificate of evidence—what is effect of absence of. p. 104.
Certificate of trial judge—when essential as to facts occurring on trial. p. 556.
Certified record—what is effect on appeal. p. 260.
—— when affidavit attacking correctness insufficient. p. 260.
Chancery record—how omission of clerk to enter placita may be supplied. p. 260.
Change of theory—when not permitted on appeal. p. 403.
Conflicting evidence—when verdict based on, not disturbed. p. 225.
Constitutional question—when presumed not involved. p. 431.
Criminal proceedings, see CRIMINAL LAW.
Cross-bill—when sufficient on appeal. p. 451.
Cure of error—when admission of secondary evidence cured. p. 305.
—— when sustaining objection to question cured. p. 556.
Default of codefendant—when defendant may not object to. p. 260.
Depositions—when objections not considered. p. 200.
Dictum—what effect given to. p. 53.
Discretion—when refusal to allow filing of amendment not abuse of. p. 6.

Estoppel—when party procuring exclusion of evidence may not complain of failure to establish fact. p. 289.
Evidence—when objection considered although similar evidence admitted without objection. p. 215.
—— when objection not considered. p. 280.
—— when party estopped to complain of want of. pp. 151, 467.
—— when verdict not disturbed as unsupported by. p. 159.
Failure to argue assignment—when constitutes a waiver. p. 131.
Final judgment—what is. p. 627.
Finding of court—when not disturbed as unsupported by evidence. p. 622.
Findings of jury—when not disturbed where approved by chancellor. p. 399.
Former appeal—what effect given to dictum. p. 53.
Harmless error—when admission of evidence is. pp. 166, 646.
—— when admission of parol evidence is. p. 22.
—— when argument of counsel is. pp. 9, 166.
—— when exclusion of evidence is. p. 501.
—— when exclusion of evidence is on trial by court. p. 218.
—— when improper joinder of causes is. p. 464.
—— when instruction is. p. 465.
—— when instruction on amount of recovery is. p. 193.
—— when instruction on contributory negligence is. p. 184.
—— when instruction on credibility of witnesses is. p. 556.
—— when instruction on damages is. p. 184.
—— when instruction on right of private person to make arrest is. p. 202.
—— when modification of instruction is. p. 208.
—— when order providing for approval of injunction bond by clerk is. p. 157.
—— when overruling objection to form of question is. p. 131.
—— when refusal of instruction is. p. 225.
—— when refusal of leave to file special plea is. p. 320.
—— when rulings on propositions of law are. p. 385.
—— when secondary evidence is. p. 166.
—— when statement of belief by counsel is. p. 9.
—— when sustaining demurrer to special plea is. p. 320.
—— when use of copies of letters on cross-examination is. p. 149.
—— when use of word "affect" instead of "effect" in instruction is. p. 426.
Instruction—when party may not complain of. p. 119.
—— when party may not complain of modification of erroneous request. p. 184.
Judgment—what is effect of final judgment on appeal. p. 600.
—— when reversed because erroneously framed under State law. p. 75.
Judicial notice—when taken of warrant of attorney not set out in bill of exceptions. p. 210.

Jurisdiction—when question of, raised too late. p. 38.
Moot case—when judgment not reversed because. p. 595.
Objection—when considered although similar evidence admitted without objection. p. 215.
Party—what is effect of death pending appeal. p. 108.
Peremptory instruction—when failure to give in writing not ground for reversal. p. 63.
Presumption—what presumed in favor of denial of motion for new trial. p. 556.
—— when court presumed warranted in finding allegations in bill for preliminary injunction true. p. 104.
—— when presumed that court heard only competent evidence. p. 621.
—— when presumed that court properly struck amended special plea from file. p. 108.
—— when presumed that proofs justified finding and judgment. p. 108.
—— when presumed that ruling of Circuit Court dismissing case was proper. p. 643.
—— when quashing of fee bill presumed correct. p. 430.
Record—how may not be impeached. p. 536.
—— how omission of clerk to enter placita may be supplied. p. 260.
—— when may be amended. p. 536.
—— when presumed to contain all evidence on question. p. 331.
Remittitur—when judgment affirmed upon entry of. p. 467.
Reversal—when cause must be remanded on. p. 179.
—— when cause must be reversed as to all defendants where erroneous as to one. p. 612.
—— when cause not remanded on. p. 331.
—— when cause remanded. p. 424.
—— when failure to amend by striking out name of party dismissed not proper ground for. p. 108.
—— when misconduct of counsel ground for. p. 324.
—— when not granted. p. 184.
—— when not granted for slight errors. p. 305.
—— when remanded for further proceedings. p. 549.
Reversible error—when giving of oral instruction is. p. 233.
Review—when questions not properly preserved for. p. 6.
Saving question—when relief must be sought in lower court. p. 175.
Sheriff's return—when insufficiency of, not considered on appeal. p. 116.
Supplemental record—when may be certified and filed by clerk. p. 260.
Supreme Court—when opinion of, on same facts binding. p. 605.
Theory of case—when party estopped to change in Appellate Court. p. 75.
Variance—when immaterial. p. 2.
—— when waived. p. 166.

Venue—when refusal to change ground for reversal. p. 136.
Verdict—when defendant may not complain of. p. 470.
—— when neither party may complain of amount of. p. 208.
—— when not disturbed. p. 646.
—— when not disturbed as against weight of evidence. p. 392.
—— when presumed sustained by evidence. p. 464.
—— when set aside as against preponderance. p. 588.
Waiver of error—when error in striking statement of set-off waived. p. 6.
—— when errors not argued in brief waived. p. 556.
Witnesses—when objection to failure to properly swear not available for first time on appeal. p. 260.
Workmen's compensation—what bill of exceptions must contain for review of ruling on motion to quash certiorari. p. 646.
Writ of error—when does not lie after unsuccessful appeal. p. 600.

APPEARANCE.

Plea—when cures failure to file. p. 464.

ARBITRATION AND AWARD.

Judgment—when power to confess on award invalid. p. 210.

ARREST.

Instruction—when harmless on right of private person to arrest. p. 202.

ASSIGNMENTS.

Acceptance by debtor—when necessary. p. 380.
Action by assignee—what required as to allegations of ownership. p. 591.
Approval by debtor—when unnecessary. p. 380.
Expectant estate—when may be assigned. p. 583.
Insurance—when administrator may not question. p. 441.
Non-negotiable chose in action—when recovery denied because of insufficiency of pleading. p. 591.
Part of claim—when acceptance by payor necessary. p. 380.
Rights of assignees—what are. p. 380.

ASSUMPSIT.

Award in compensation proceedings—when county court has jurisdiction. p. 45.
Bank deposit—when evidence sustains judgment for administrator for amount of. p. 277.
Common counts—what is purpose of. p. 149.
—— when recovery may be had for labor performed. p. 166.
—— when recovery may be had on, for money due. p. 125.
—— when recovery may be had on notes. p. 149.

Negotiable instruments—when recovery may be had on common counts. p. 149.
Promise to pay debt of another—when evidence insufficient to sustain judgment for plaintiff. p. 342.
Property conveyed under oral agreement—when lies to recover value of. p. 320.
Quantum meruit—what is extent of recovery for labor in action on. p. 166.
—— when seller may sue on after abandonment of contract by purchaser. p. 179.
Value of property—when evidence sufficient to sustain verdict as to. p. 320.
Workmen's compensation—when proper proceeding to recover on award. p. 45.

ATTORNEYS.

Action for fees—when evidence of good character incompetent. p. 215.
Administrators—when not entitled to lien under agreement entered into with, before appointment. p. 446.
Fees—when indemnity bond does not cover. p. 82.
Liens—how notice to establish must be given. p. 446.
—— what is effect of admitting service of notice. p. 446.
—— when not entitled to, for services. p. 446.

AUTOMOBILES.

Act of 1913—what is effect of repeal. p. 301.
Contributory negligence—when instruction on, as to auto-truck driver, correct. p. 392.
Garage proprietor—when bailee for hire. p. 612.
—— when not a servant. p. 612.
Owner—when not liable for negligence of garage proprietor in operating machine. p. 612.
Ownership—when evidence of insufficient to support verdict. p. 61.
Signals on turning—when ordinance requiring, valid. p. 392.
Street railroads—when evidence shows contributory negligence on part of driver of truck. p. 392.
—— when evidence sufficient to show negligence on part of. p. 392.
Traffic ordinance—when admissible in an action for damages for collision. p. 392.

BAILMENT.

Bailor—when not liable for act of bailee. p. 612.
Garage proprietor—when bailee for hire. p. 612.

BANKRUPTCY.

Discharge—what is effect of. p. 583.

BANKS AND BANKING.

Authority to pay out proceeds—what competent to show. p. 624.
Deposit—what evidence admissible in action by depositor to recover. p. 621.
—— when evidence sufficient to show authority to pay to creditor. p. 624.
—— when evidence sufficient to show ratification by depositor of payment to creditor. p. 624.

BASTARDS.

Bond—what is nature of. p. 617.
—— when surety not discharged by death of putative father. p. 617.
—— when surety on, not discharged. p. 617.
Evidence—what degree of proof required. p. 469.
—— when verdict against weight of. p. 469.
Intercourse—when exact day of, immaterial. p. 610.
Nature of action—what is. p. 617.
Presence of defendant with prosecutrix—when question for jury. p. 610.
Verdict—when set aside. p. 469.

BONDS.

Interest coupons—when holder of, secured by trust deed, has right of action. p. 509.
Interstate shipment of intoxicants—when recovery may be had on bond for payment of purchase price. p. 633.

BRIDGES.

Evidence—when insufficient to sustain finding as to being unsafe for travel. p. 476.

BROKERS.

Commission—when entitled to, upon procuring purchaser. p. 426.
—— when instruction improper. p. 644.
—— when instruction improperly modified in action for. p. 208.
—— when instruction in action for, properly refused. p. 426.
—— when instruction on burden of proof correct. p. 208.
—— when instruction on right to recover correct. p. 426.
Contract—when evidence sufficiently shows that contract of employment was not made. p. 183.
—— when evidence sustains finding that terms were not modified. p. 208.

Deceit—what is effect on right to recover commission. p. 378.
Evidence—what inadmissible. p. 183.
Instruction—when properly refused as to furnishing of buyer. p. 183.
License—when evidence of want of, inadmissible. p. 42.
Offer to act as—when evidence shows acceptance. p. 208.

BUILDING AND LOAN ASSOCIATIONS.

Premiums on loan—when chargeable up to time of insolvency. p. 56.

BULK SALES.

Goods and chattels—what are within act. p. 420.
Sale of chattels—when not in violation of act. p. 420.
Sale of major portion—what does not constitute. p. 420.
Termination of business—when sales after not within act. p. 420.

CANCELLATION OF INSTRUMENTS.

Mental capacity—when evidence sufficient to show. p. 399.

CARRIERS.

Alighting—when contributory negligence of passenger after, question for jury. p. 487.
—— when evidence shows contributory negligence on part of passenger. p. 115.
Carmack Amendment—what is effect of, on Interstate Commerce Act. p. 347.
Collision with vehicle—when evidence sustains verdict for injuries to passengers. p. 9.
Discharging passengers—when instruction on duty not to run car past, erroneous. p. 487.
Failure to furnish suitable cars—when evidence insufficient as basis for computation of damages. p. 641.
Flood—when liable for loss of goods by, due to failure to transport goods promptly. p. 347.
Instructions—when not erroneous as assuming duty on part of motorman to sound gong. p. 646.
Lookout for cars—when instruction on duty of passenger confusing. p. 487.
Operation of street car—when evidence insufficient to establish negligence. p. 115.

CHATTEL MORTGAGES.

Crops—what not a severance from realty. p. 315.

CHILDREN.

See INFANTS.

CITIES AND VILLAGES.

Ashes—what is extent of duty as to removal. p. 35.
—— what is limit of tax levy for removal of. p. 35.
—— when city authorized to regulate removal. p. 35.
—— when city not liable for cost of removal of. p. 35.
—— when duty of removing not imposed upon city. p. 35.
Bridges—when evidence insufficient to sustain a finding as to being unsafe for travel. p. 479.
Common council—when former member of, not estopped to recover for personal injuries received. p. 303.
Contract for nursing—when has power to make. p. 527.
Dedication—what does not constitute acceptance. p. 86.
Drivers of vehicles—when ordinance requiring signals by, valid. p. 392.
Electricity—when evidence sustains finding of negligence in failing to repair broken wire. p. 184.
Excavations in street—when city must take notice of. p. 131.
—— when city negligent in failing to repair. p. 303.
—— when duty of city to protect public against. p. 131.
—— when instruction as to sufficiency of lights properly modified. p. 131.
—— when sufficiency of barriers and lights question for jury. p. 131.
Franchise—when ordinance grants use of street for interurban railroad. p. 352.
Laying of pipes in street—when instruction on right of city to authorize, correct. p. 476.
Licenses—when evidence of amount of business done admissible on reasonableness of fee. p. 218.
—— when evidence of cost of supervision of telegraph poles improperly excluded. p. 218.
—— when fee imposed on telegraph company for maintenance of poles a license fee and not a rental. p. 218.
—— when fee imposed on telegraph company not unreasonable. p. 218.
—— when has power to impose fee for maintenance of telegraph poles. p. 218.
Notice of personal injuries—when sufficient although address of attending physician not inserted. p. 547.
Ordinances—how construed. p. 352.
—— what is effect of departure from form prescribed for passage of. p. 254.

Sidewalks—how may be constructed. p. 159.
—— how must be supported. p. 159.
—— what are requisites of wooden. p. 119.
—— what degree of care required of, as to condition of. p. 159.
—— what evidence admissible as to construction, etc. p. 159.
—— when charged with notice of probable latent defects. p. 159.
—— when evidence shows negligence in failing to inspect. p. 119.
—— when existence of crack in slab before accident question for jury. p. 159.
—— when one making complaint of condition of, not guilty of contributory negligence in sitting on. p. 119.
—— when question of exercise of ordinary care in supporting stone used in, for jury. p. 159.
—— when refusal of instruction as to negligence proper. p. 159.
—— when requested instruction properly refused as inapplicable. p. 119.
Streets—when city charged with notice of defect in. p. 303.
—— when contributory negligence of pedestrian stepping into hole, question for jury. p. 303.
—— when former member of city council not estopped to recover for personal injuries. p. 303.
—— when knowledge by pedestrian of defect, is a question for jury. p. 303.
—— when question as to whether street suitable for travel for jury. p. 476.
Traffic—what is extent of power to regulate by ordinance. p. 392.
—— when ordinance giving right of way on certain streets valid. p. 392.
Veto—what is proper action by legislative body upon return of measure. p. 254.
—— when measure adopted over. p. 254.
Vetoed measure—what constitutes a reconsideration of. p. 254.
—— what is proper action on adoption of motion to reconsider. p. 254.
Width of road—when improvement question for local authority. p. 324.

CIVIL DAMAGE ACT.

See DRAMSHOPS.

COMMERCE.

Carmack Amendment—what is effect of on Interstate Commerce Act. p. 347.
Interstate—when evidence sufficient to establish prima facie case of engagement in. p. 305.

Interstate—when evidence sufficient to show that employee was injured by interstate car. p. 75.
—— when flagman engaged in, at time of injury. p. 75.
—— when railroad company presumed to be performing duty to deliver car. p. 305.
—— when unnecessary that coemployee be engaged in. p. 75.

COMPROMISE AND SETTLEMENT.

Acceptance by minor—when presumed. p. 441.

CONTRACTS.

Abandonment—what is effect of construction by parties. p. 166.
Abandonment of claim—what does not constitute. p. 501.
Acceptance—when insufficient. p. 17.
Breach—when evidence insufficient to show. p. 17.
Business—what does not constitute abandonment of contract not to engage in. p. 157.
Consideration—when parol evidence admissible to show. p. 26.
—— when promise to pay off incumbrance unsupported by. p. 640.
Construction—what is effect of construction by parties. p. 166.
Evidence—when insufficient to establish. p. 17.
Existence—when evidence as to, admissible. p. 644.
—— when question for court. p. 136.
Fiduciary relations—when contract set aside. p. 1.
Indemnity bond—when acceptance of waived in other provisions of contract. p. 32.
Losses—how to be determined. p. 53.
Meeting of minds—when absent. pp. 20, 136.
Modification in part—what is effect of. p. 166.
Oral agreement—when merged in written contract. p. 471.
Parol evidence—when admissible to show consideration. p. 26.
—— when inadmissible. p. 471.
—— when inadmissible to show character of transaction. p. 22.
Profits—when interest to be included in determining. p. 53.
Promise to pay debt of another—when evidence insufficient to sustain judgment for plaintiff. p. 342.
Rescission—what is effect of. p. 179.
—— what is effect of construction by parties. p. 166.
—— when bill to enjoin violation does not allege. p. 157.
—— when party may not rescind in part. p. 166.
Separate papers—when considered as one instrument. p. 395.
Stipulation for credit—when waived. p. 166.
Third person—when may sue on, in his own name. p. 501.

CONVEYANCES.

Grantor—when not estopped to claim that deed was not given as a mortgage. p. 320.

Mortgages—when evidence establishes character as deed and not as mortgage. p. 320.

COSTS.

Fee bill—when quashing of presumed correct. p. 430.
Highway commissioners—when not personally liable for. p. 239.

COUNTIES.

Expenditures—when bill to enjoin excessive, sufficient. p. 419.

COUNTY COURT.

Award in compensation proceedings—when has jurisdiction. p. 45.

COURTS.

Dictum—what effect given to on subsequent appeal. p. 53.
Supreme Court—when opinion of, on same facts binding. p. 605.
Transfer of causes—when cause not transferred to equity side. p. 320.

CREDITOR'S BILL.

Fraud in entry of judgment—when court may inquire into on behalf of defendant. p. 451.
Invalidity of judgment—when bill must be dismissed. p. 451.

CRIMINAL LAW.

Bill of exceptions—what is effect of failure to preserve proceedings in. p. 13.
—— when record will not prevail against. p. 46.
False pretenses—when information sufficient. p. 13.
Fine—when accused may not be sentenced to "poor farm" to work out. p. 531.
Incompetent evidence—when admission of not ground for reversal. p. 59.
Judgment—when in proper form. p. 607.
—— when reversed as a whole. p. 536.
"Money"—when presumed to be genuine money of United States. p. 13.
Motion in arrest of judgment—when does not reach defect in information. p. 13.
Plea of guilty—when entry improper. p. 46.
—— when explanation of consequences of, insufficient. p. 46.
Punishment—when not excessive. p. 607.
Reopening of case—when not ground for reversal. p. 59.

Trial—when reopening of case to admit evidence not ground for reversal. p. 59.
Verification—when objection to form of, too late. p. 59.
Wife desertion—when finding insufficient as basis for conviction. p. 428.
—— when resident of another State not guilty of refusal to support wife. p. 428.

CROPS.

Landlord—when presumed to have title where mortgaged by. p. 315.
Mortgages—what does not constitute severance from realty. p. 315.
—— what is extent of title which may be conveyed to mortgagee. p. 315.
—— when covered by mortgage on land. p. 315.
Mortgagor—when entitled to. p. 315.
Renting on shares—when landlord has title to crops. p. 315.

CUSTOMS AND USAGES.

Animals—when evidence admissible as to custom of animals to run at large. p. 339.

DAMAGES.

Contract to convey property—what is measure for breach. p. 320.
Contract to repurchase unsold land—what is measure of damages for breach. p. 125.
Death—when instruction not erroneous as authorizing jury to consider all the evidence in determining damages. p. 184.
—— when instruction not erroneous as ignoring defense of contributory negligence. p. 184.
Depreciated currency—what is measure of recovery of check payable in. p. 22.
Destruction of property—what is measure of damages for. p. 496.
Evidence—when inadmissible as to extent of personal injuries. p. 487.
—— when insufficient as basis for computation. p. 641.
—— when insufficient to sustain verdict. p. 496.
—— when physician may state whether physical condition was result of accident. p. 225.
Excessive—when $1,200 not. p. 225.
—— when $2,000 not. p. 119.
—— when $3,000 not. pp. 9, 131, 431.
—— when $7,000 not. pp. 289, 556.
—— when $7,200 not. p. 247.
—— when $8,000 not. p. 305.
Foreign currency—what is measure of recovery on check payable in. p. 22.

Fraudulent representations as to title—what is measure of damages. p. 483.
Future earnings—what admissible on question of loss of. p. 487.
—— when instruction on computation for loss of, erroneous. p. 487.
Habitual litigant—when evidence insufficient to show that plaintiff was. p. 556.
Instruction—when not erroneous on measure of for personal injury. p. 100.
—— when proper as limiting recovery to pecuniary damages for death. p. 184.
—— when should confine recovery to injury complained of. p. 100.
Loss of earning power—when declaration sufficient to admit proof of. p. 225.
Measure—when instruction need not involve any element of due care. p. 289.
Mitigation—what evidence admissible in action for false imprisonment. p. 202.
Pleading—when allegation sufficient as basis for proof of loss of earning power. p. 225.

DEATH.

Children—when instruction limiting damages to pecuniary, proper. p. 184.
Damages—when instruction limiting recovery proper. p. 184.
—— when $7,000 not excessive. p. 289.
—— when $7,200 not excessive. p. 247.
Due care—what may be considered on question of. p. 289.
—— when instruction need not contain requirement that jury should find deceased in exercise of. p. 289.
Instruction—when not erroneous as authorizing jury to consider all the evidence in determining damages. p. 184.
—— when not erroneous as ignoring defense of contributory negligence. p. 184.

DEDICATION.

Offer of—what does not constitute acceptance of by city. p. 86.
Plat—when approval wrongfully refused by municipality. p. 86.
—— when may not be recorded. p. 86.
—— when petition for mandamus shows compliance with statutory requirements. p. 86.
—— when statutory approval enforced by mandamus. p. 86.
Platting—how statutes construed. p. 86.
Railroad tracks—when dedication of way over not established. p. 331.
Recording of plat—how statute construed. p. 86.
Statutes—how construed. p. 86.

DEEDS.

See CONVEYANCES.

DEPOSITIONS.

Objection—when must be made before trial. p. 200.
—— when not considered on appeal. p. 200.

DISMISSAL.

Judgment—when suit dismissed on vacation of void judgment. p. 210.
Striking out name of party dismissed—when failure to amend by, not ground for reversal. p. 108.

DISORDERLY HOUSES.

Inmate—when evidence shows defendant to have been. p. 68.

DIVORCE.

Alimony—what orders relative to, proper. p. 338.
—— when amount of, properly reduced. p. 538.
—— when refusal to reduce erroneous. p. 338.
—— when temporary, properly allowed. p. 584.
Desertion—when sufficient ground not shown for. p. 49.
Marriage within one year—when not prima facie invalid. p. 584.

DOMICILE.

Residence in another state—when evidence sufficient to show. p. 143.

DRAINAGE.

Altering construction of ditch—what is duty of commissioners. p. 514.
Commissioners—what is duty of, in construction of ditches. p. 514.
—— when interest of, does not disqualify. p. 577.
—— when mandamus will not lie to compel making of improvements. p. 514.
—— when propositions of law on duties of, correct. p. 514.
Defective condition of ditch—when commissioners may be compelled to remedy. p. 514.
—— when mandamus to compel commissioners to remedy, allowed. p. 514.
—— when statute does not run against right to compel remedying. p. 514.

Enlarging ditch—when propositions of law as to duties of commissioners, properly modified. p. 514.
Feasibility of improvement—when question of fact. p. 514.
Flooding land—when commissioners have no authority to flood land not in natural course of drainage. p. 514.
Limitation of actions—when remedy by mandamus barred for remedying of defective condition of ditch. p. 514.
Repair—when remedy for failure to keep in repair, not barred by statute of limitations. p. 514.
Subdistrict—when organization of unnecessary. p. 577.
Taking or damaging land—what does not constitute. p. 514.

DRAMSHOPS.

Abatement—when evidence shows defendant keeper of place where liquors are sold. p. 536.
Anti-saloon territory—when evidence sufficient to connect defendant with offense of selling liquor in. p. 531.
—— when evidence sufficient to sustain conviction for sale in. p. 531.
Beer—when presumed to be intoxicating. p. 531.
Burden of proof—when instructions on properly refused. p. 603.
Civil Damage Act—when declarations as to intention to commit suicide inadmissible. p. 193.
—— when evidence shows death as a result of habitual intoxication. p. 151.
—— when evidence shows intoxication at time of death. p. 193.
—— when evidence shows loss of means of support. p. 151.
—— when furnishing of money to husband to buy liquor does not bar recovery. p. 151.
—— when furnishing of money to husband to buy liquor may be considered only in mitigation of damages. p. 151.
—— when wife not precluded from recovery. p. 151.
Common hall—when immaterial whether officer could close. p. 531.
Conviction—when judgments in proper form. p. 607.
—— when reversed as a whole. p. 536.
—— when sustained in part. p. 531.
Interstate shipment—when recovery may be had on bond for payment of purchase price. p. 633.
Intoxicating liquor—when instruction as to what constitutes, correct. p. 603.
—— when statutory definition valid. p. 603.
Local option election—when addresses of signers of petition sufficient. p. 595.
—— when presumed that addresses of signers of petition, correct. p. 595.
Local Option Law—when violated by means of shifts and devices. p. 605.

Punishment—when not excessive. p. 607.

EASEMENT.

Railroad right of way—when prescriptive right across, established. p. 331.

ELECTION.

Local option election—when addresses of signers of petition sufficient. p. 595.
—— when presumed that addresses of signers of petition correct. p. 595.

ELECTRICITY.

Broken wire—when evidence sustains finding of negligence in failing to repair. p. 184.
Care to prevent injury—what degree required. p. 184.
Children—when contributory negligence in handling live wire for jury. p. 184.
Knowledge of danger—when not presumed on part of boy. p. 184.

EMINENT DOMAIN.

Taking or damaging land—what does not constitute. p. 514.

EQUITY.

Adequacy of legal remedy—when complainant estopped to assert on behalf of defendant. p. 451.
Assumed indebtedness—when decree requiring insurance company to pay, proper. p. 71.
Concurrent jurisdiction—when has with courts of law. p. 451.
Cross-bill seeking affirmative relief—when proper in action by insurance company to set aside judgment on insurance policy. p. 71.
Interpleader—what improper in bill for. p. 441.
Jurisdiction—when may be exercised to adjudicate all rights of parties. p. 71.
—— when party estopped to claim lack of, in equity. p. 451.
—— when retained. p. 451.
Master's findings—when evidence sufficient to support. p. 1.
Parties—when court may on its own initiative require proper parties to be brought in. p. 273.
Record—how omission of clerk to enter placita may be supplied. p. 260.
Reference—when master may report all stipulations and agreements made orally by parties. p. 260.

Re-reference—when unnecessary. p. 260.
Transfer of causes—when cause not transferred to equity side. p. 320.

ESTATES.

Expectant—when may be assigned. p. 583.

ESTATES OF DECEDENTS.

Administrator—when creditor not entitled to preference in administration. p. 143.
—— when estate not bound by attorney's liens under agreement entered into with administrator before appointment. p. 446.
—— when not personally liable for negligence of garage man with whom machine left for repairs. p. 612.
Bank deposit—when evidence sustains judgment for administration for amount of. p. 277.
Confidential agent—when has burden to show right to personalty in possession after death of owner. p. 258.
Creditor—when not entitled to preference in administration. p. 143.
Discovery of concealed effects—when evidence shows that note owned by decedent was not given in payment for services. p. 258.
Expenditures—when evidence sustains finding as to. p. 258.
Fiduciary relations—when evidence sufficient to show. p. 258.
Insurance policy—when administrator may not question assignment. p. 441.
Joint guarantors of notes—when executrix not proper party to action against. p. 108.
Public administrator—how far preferred. p. 143.
Recoupment—when defendant in action by administrator may recoup expenses. p. 277.
Trover—when administrator may maintain for conversion of certificate cashed by defendant during deceased's lifetime. p. 588.

ESTOPPEL.

Agent—when principal estopped to repudiate authority. p. 17.
Employer—when not estopped to enjoin employee engaging in same business in violation of contract. p. 157.
Grantor—when not estopped to claim that deed was not given as a mortgage. p. 320.
Jurisdiction of equity—when complainant estopped to question. p. 451.
Officers—when estopped to claim defects in minutes of meeting. p. 621.
—— when estopped to claim irregularity in form of record of meeting. p. 621.

Personal injuries—when former member of city council not estopped to recover for personal injuries incurred in street. p. 303.

EVIDENCE.

Assessed valuation—when immaterial in determining value. p. 175.
Banks—what admissible in action by depositor to recover deposit. p. 624.
Brokers—what inadmissible in action for commissions. p. 183.
Burden of proof—when confidential agent must show right to personalty in his possession after death of owner. p. 258.
—— when instructions correct in action for broker's commission. p. 208.
—— when instructions properly refused in prosecution for selling liquor. p. 603.
—— when on agent on bill for accounting by principal. p. 1.
—— when on debtor as to usury. p. 42.
Certified transcript of court record—when admissible. p. 483.
Circumstantial—when instruction properly refused. p. 431.
Copies of letters—when use of, for cross-examination without foundation improper. p. 149.
Copy of mortgage—when inadmissible. p. 483.
Declaration—when inadmissible in action under Civil Damage Act as to intention to commit suicide. p. 193.
Documentary—what is purpose of. p. 351.
—— when insufficient foundation laid for admission of. p. 553.
Exhibition of injury—when not error. p. 556.
—— when proper. p. 305.
Future earnings—what admissible on question of loss. p. 487.
Good character—when inadmissible in action by attorney for fees. p. 215.
Judicial notice—when taken of statute granting railroad charter and amendment. p. 75.
Market value—when may not be determined on basis of revenue. p. 175.
Mitigation of damages—what admissible in action for false imprisonment. p. 202.
Number of witnesses—when instruction ignoring, objectionable. p. 9.
Objection—when not sufficiently specific. p. 225.
Opinion—when nonexpert witness may state opinion as to physical condition. p. 225.
—— when physician may state whether physical condition was result of accident. p. 225.
Parol—when admissible to show character of transaction. p. 22.
—— when admissible to show consideration of contract. p. 26.
—— when inadmissible. p. 471.

Personal injuries—when inadmissible as to extent of. p. 487.
Possession—when proof of title. p. 258.
Preponderance—what constitutes. p. 470.
—— what may be considered by jury in determining. p. 9.
—— when instruction improper. p. 9.
—— when instruction not misleading. p. 9.
Presumption—when beer presumed to be intoxicating. p. 531.
—— when presumed that process sent through mails received. p. 71.
Res gestæ—what admissible as part of. p. 431.
—— what competent as part of. p. 624.
—— when evidence of defective condition of coupler on another car admissible as part of. p. 305.
—— when manner in which cars came together while being coupled admissible as part of. p. 305.
Secondary—when admission harmless. p. 166.
—— when copy of mortgage inadmissible. p. 483.
—— when foundation sufficient for admission. p. 22.
Sidewalks—what admissible as to construction, etc., in action for injury. p. 159.
Subjective symptoms—when testimony of attending physician concerning, admissible. p. 225.
Telegrams—when admissible. p. 644.
Value—when evidence of assessed valuation immaterial in determining. p. 175.
—— when may not be determined on basis of revenue. p. 175.
Workmen's compensation—when evidence as to liability properly excluded in assumpsit on award. p. 45.

EXCHANGE OF PROPERTY.

False representations—when evidence shows as to title. p. 483.
Fraud—what is measure of damages. p. 483.

EXECUTION.

Improper levy—what is proper method of relief from. p. 395.
Special—when should be quashed. p. 627.

FALSE IMPRISONMENT.

Mitigation of damages—when evidence admissible in. p. 202.

FALSE PRETENSES.

False representations—when person making charge with knowledge of falsity guilty of. p. 13.
Information—when objection must be raised by motion to quash. p. 13.

Information—when presumed "money" referred to is genuine money of United States. p. 13.
—— when sufficient. p. 13.
Intent to defraud—when evidence shows. p. 69.
Ownership of property—when assumed. p. 13.
Person defrauded—when shown to be person filing information. p. 13.
Reliance upon representation—when shown. p. 13.

FEDERAL EMPLOYERS' LIABILITY ACT.

Assumption of risk—how provision of act as to construed. p. 75.
—— what risk not assumed. p. 247.
—— when defense of unavailable. p. 305.
Common carrier—when evidence sufficient to show that defendant was. p. 75.
Contributory negligence—what is effect of. p. 247.
—— when defense of unavailable. p. 305.
Cutting off coaches—when negligence question for jury. p. 247.
Damages—when $7,200 not excessive. p. 247.
—— when $8,000 not excessive. p. 305.
Decisions controlling—what are. p. 75.
Flagman—when engaged in interstate commerce at time of injury. p. 75.
Interstate commerce—when act applies to servants engaged in. p. 305.
—— when evidence establishes prima facie case of employment in. p. 305.
—— when evidence shows that flagman was struck by interstate car. p. 75.
—— when railroad company presumed to be performing duty to deliver car. p. 305.
—— when unnecessary that coemployee be engaged in. p. 75.
Instruction—when correct. p. 305.
Pleading—when declaration must allege parties employed in interstate commerce. p. 305.
Pushing cars—when evidence sufficient to show undue violence. p. 247.
Railroad—when evidence shows that defendant was. p. 75.
Remedy—when exclusive. p. 75.
Res gestæ—what evidence admissible as. p. 305.
—— when manner in which cars came together while being coupled admissible as part of. p. 305.
Safety Appliance Act—when noncompliance constitutes proximate cause. p. 305.
State law—when recovery may not be had under, in action under the Federal Act. p. 75.

Switching operations—when car inspector does not assume risk of being struck by cars during. p. 247.
Variance—when defendant not estopped to raise question. p. 75.

FORNICATION.

Information—when not repugnant. p. 59.
Judgment—when supports conviction. p. 59.
Status of paramour—when need not be shown. p. 59.

FRANCHISES.

Interurban railroad—when ordinance grants use of street for. p. 352.

FRATERNAL SOCIETIES.

See also INSURANCE.

Application—when part of contract. p. 359.
Assessments—how member suspended by nonpayment may be reinstated. p. 200.
—— when evidence shows failure to pay delinquent. p. 200.
—— when failure to pay automatically causes suspension. p. 200.
—— when member not bound by by-laws increasing. p. 71.
—— when receipt of dues by local officer does not waive requirements as to reinstatement. p. 200.
By-laws—when insured bound by change in. p. 359.
—— when limitation of time of commencing for suit valid. p. 359.
Dependent—when person entitled to recover as. p. 448.
Local and national organizations—when action properly brought against. p. 448.

FRAUD.

Action for—when lies. p. 483.
Equity—when has concurrent jurisdiction with courts of law. p. 451.
Establishment—what is necessary. p. 29.
False representations—when evidence shows. p. 29.
—— when evidence shows as to title to realty. p. 483.
Misrepresentations as to title—what is measure of damages. p. 483.
Presumed—when not. p. 29.
Release—when procured by fraud. p. 71.
Representation—when constitutes promise. p. 29.

FRAUDS, STATUTE OF.

Promises—when promise to repay money loaned promisor's wife is within statute. p. 342.

FRAUDULENT CONVEYANCES.

Bulk Sales Act—what are goods and chattels within. p. 420.
—— what does not constitute sale of major portion of goods and chattels. p. 420.
—— when business terminated so that sale not within act. p. 420.
—— when sale not in violation of. p. 420.
Fraud—what is badge of. p. 175.
Knowledge of indebtedness—when evidence shows. p. 175.
Reimbursement—when grantee not entitled to insist upon. p. 175.
Relationship—when considered to impeach. p. 175.
Sale to relatives—when no presumption as to lack of good faith arises from. p. 175.
Sufficient consideration—when evidence shows. p. 175.
Voluntary gift—when invalid. p. 175.

GARAGES.

Bailee for hire—when. p. 612.
Master and servant—when relation does not exist as to patron. p. 612.
Owner of machine—when not liable for negligence of garage proprietor. p. 612.

GIFTS.

Causa mortis—what does not constitute. p. 466.
—— when valid. p. 466.
Injustice—when does invalidate. p. 588.
Mental capacity—when evidence sufficient to show. p. 588.

GUARANTY.

Joint guarantors—when executrix not proper party to action against. p. 108.
Joint judgment—when lies only against specific guarantors. p. 108.

HIGHWAYS.

See ROADS AND BRIDGES.

HOUSES OF ILL-FAME.

See DISORDERLY HOUSES.

HUSBAND AND WIFE.

Lessee—when wife of, has right to use of stairway. p. 96.
Money loaned to wife—when husband not liable for. p. 342.

Wife desertion—when finding insufficient as basis for conviction. p. 428.
—— when resident of another State not guilty of refusal to support. p. 428.

INDEMNITY.

Bond—how construed, p. 32.
—— when acceptance of, waived by other provisions of contract. p. 32.
—— when does not cover liability for attorney's fees and expenses p. 32.

INDICTMENT AND INFORMATION.

False pretenses—when information sufficient. p. 13.
Motion in arrest—when does not reach defect in information. p. 13.
Objection—when must be raised by motion to quash. p. 13.
Repugnant—when not. p. 59.
Verification—when objection to form of, too late. p. 59.

INFANTS.

Electricity—when knowledge of danger not presumed on part of boy. p. 184.
Negligence—what degree of care required not to injure. p. 184.
—— what degree of care required of. p. 184.
—— when contributory negligence for jury. p. 184.
—— when contributory negligence in handling live wire for jury. p. 184.

INFORMATION.

See INDICTMENT and INFORMATION.

INJUNCTION.

Bill—when sufficient. p. 418.
Bond—when order requiring approval by clerk harmless. p. 157.
Dismissal of bill—when proper on denial of temporary injunction. p. 418.
Judgment—what bill to restrain enforcement on ground of fraud must show. p. 395.
—— what is venue of bill. p. 395.
—— when bill to restrain enforcement, defective. p. 395.
—— when enforcement may be enjoined. p. 395.
—— when enforcement not restrained. p. 395.
Mandatory—when granted on final hearing. p. 104.
Preliminary—what considered on application for. p. 104.

Preliminary—what is nature of hearing of motion to dissolve. p. 529.
—— what is purpose of. p. 104.
—— when denial of motion to require defendants to plead before hearing on motion for injunction harmless error. p. 418.
—— when denied. p. 104.
—— when dismissal of bill on denial of temporary injunction improper. p. 418.
—— when granted. p. 104.
—— when improper as in nature of mandatory. p. 104.
—— when mandatory injunction not granted on. p. 104.
—— when not dissolved. p. 529.
—— when order for issuance invalid. p. 157.
—— when proper to prevent violation of contract not to engage in same business. p. 157.
—— when properly dissolved. p. 529.
—— when properly granted on answer. p. 157.
Rescission of contract—when bill to enjoin violation of contract does not allege. p. 157.
Status quo—when preserved. p. 529.

INSANITY.

Mental capacity—when evidence shows. p. 588.
Transitory mental disorders—when do not constitute. p. 359.

INSTRUCTIONS.

Assuming facts—when improper as. p. 368.
Brokers—when correct in action for commission. pp. 208, 426.
—— when improper in an action for commission. p. 644.
—— when improperly modified in action for commission. p. 208.
—— when properly refused as to furnishing of buyer. p. 183.
—— when properly refused in action for commission. p. 426.
Burden of proof—when properly refused in prosecution for selling liquor. p. 603.
Carriers—when confusing on duty of passenger to look out for cars. p. 487.
—— when not erroneous as assuming facts. p. 646.
Circumstantial evidence—when properly refused. p. 431.
Contributory negligence—when correct as to, on part of auto driver. p. 392.
Covered by others given—when properly refused. pp. 131, 149, 159, 208.
Damages—when erroneous on computation of damages for loss of future earnings. p. 487.
—— when not erroneous on measure of, for personal injuries. p. 100.
—— when should confine recovery to injury complained of. p. 100.

Death—when not erroneous as authorizing jury to consider all the evidence in determining damages. p. 184.
—— when not erroneous as ignoring defense of contributory negligence. p. 184.
—— when proper as limiting recovery to pecuniary damages. p. 184.
Defense—when ignoring, improper. p. 378.
Directing verdict—when properly refused. p. 184.
Evidence—when improper as not in conformity with. p. 368.
—— when improper as to allegations unsupported by. p. 268.
—— when not objectionable as not referring to. p. 646.
—— when properly refused as not sustained by. p. 399.
Excavation in street—when improperly modified as to sufficiency of light. p. 131.
Federal Employers' Liability Act—when correct. p. 305.
Form of verdict—when proper. p. 131.
Insurance agent—wher correct in action for commission. p. 501.
Intoxicating liquor—when correct as to what constitutes. p. 603.
Issues—when properly refused as inapplicable. p. 183.
—— when should be given as to matters not in issue. p. 646.
Master and servant—when properly refused as to duty to make inspection. p. 431.
Misleading—when properly refused. p. 131.
Modification—when form improper. p. 202.
—— when not duty of court. p. 184.
—— when party cannot complain of. p. 184.
—— when refusal to modify request not erroneous. p. 215.
Negligence—when incorrect on degree of care of person in danger. p. 487.
—— when properly modified as to proximate cause. p. 131.
Obstruction of street—when misleading. p. 324.
Oral—how far proper. p. 233.
—— when erroneous as on a matter of substance and not on form of verdict. p. 233.
—— when erroneous as to method to be followed in arriving at amount of verdict. p. 233.
—— when giving of reversible error. p. 233.
Pleading—when improperly modified as not conforming to. p. 208.
—— when may not ignore counts. p. 301.
Preponderance of evidence—what may be considered by jury in determining. p. 9.
—— when improper. p. 9.
—— when not misleading. p. 9.
Province of jury—when bad as invading. pp. 233, 431, 487.
Request—when necessary. p. 496.
Sales—when erroneous as excluding element of implied warranty. p. 65.
—— when erroneous as to waiver of implied warranty. p. 65.
—— when erroneous on question of acceptance. p. 65.

Sand—when improper on right of tenant to remove. p. 368.
Series—when to be considered as. p. 556.
Sidewalks—when properly refused. pp. 119, 159.
Workmen's compensation—when correct in action at common law. p. 431.

INSURANCE.

Accident policy—when no recovery on, for additional per cent. p. 467.
Agent—when action by for extra commission not prematurely brought. p. 501.
—— when instruction in action by agent for commission, correct. p. 501.
—— who is, for purposes of service of process. p. 71.
Application—when evidence as to filling in by agent for insurer improperly excluded. p. 553.
—— when part of fraternal insurance contract. p. 359.
Assessments—when beneficiary not estopped to deny forfeiture for nonpayment. p. 71.
—— when evidence sufficient to show failure to pay delinquent. p. 200.
—— when failure to pay automatically causes suspension. p. 200.
—— when forfeiture for nonpayment not declared. p. 71.
—— when member not bound by by-laws increasing. p. 71.
—— when right of forfeiture for nonpayment does not exist. p. 71.
Assignment—what is effect of will making different disposition of the proceeds of assigned policy. p. 441.
—— when administrator may not question. p. 441.
—— when delivery sufficient. p. 441.
—— when valid. p. 441.
Assumed indebtedness—when decree requiring company to pay, proper. p. 71.
Beneficiary—how change of made. p. 602.
—— what constitutes change of. p. 441.
—— what evidence inadmissible to show that beneficiary was not fiancee of insured. p. 399.
—— when delivery of policy not essential on change. p. 441.
—— when dependency question of fact. p. 448.
—— when may be changed. p. 441.
—— when person entitled to recover as dependent. p. 448.
—— when person in part dependent. p. 448.
—— when substituted beneficiary entitled to proceeds. p. 441.
Benefit associations—when action properly brought against local and national organizations. p. 448.
Broker—when not liable for mistake in insuring property.. p. 20.
By-laws—when insured bound by change in. p. 359.
—— when limitation of time for commencement of suit valid. p. 359.

Change of beneficiary—when evidence as to conduct of beneficiary inadmissible in proceeding to set aside change. p. 399.
—— when evidence sufficient to show mental capacity on proceeding to set aside change. p. 399.
Cross-bill—when proper in action by insurance company to set aside judgment on insurance policy. p. 71.
Dependency—when person in part dependent. p. 448.
——. when question of fact. p. 448.
Dependent—when person entitled to recover as. p. 448.
Fire policy—when action may be maintained on oral contract to renew. p. 626.
Forfeitures—how regarded. p. 71.
Health—when evidence shows that insured did not make warranty as to, on application for reinstatement. p. 71.
Health insurance—when insured confined in house within provisions of policy. p. 473.
Indemnity, see INDEMNITY.
Insanity—when transitory mental disorders do not constitute. p. 359.
Interpleader—what not proper issue in action of. p. 441.
Limitation of actions—when by-law limiting valid. p. 359.
Live stock—what constitutes prima facie case in action on policy for death of. p. 280.
—— when evidence sufficient to show lack of fraud. p. 280.
—— when insurer of animal in foreign state cannot contend that law of such state forbids insurance of animals. p. 280.
—— when provision against shipping out of state, waived. p. 280.
Payment—when failure to demand does not defeat recovery of extra commission. p. 501.
Reinstatement—how member suspended by nonpayment of assessments may be reinstated. p. 200.
—— when evidence shows that insured did not make warranty as to health. p. 71.
—— when receipt of assessments by local office does not waive requirement for reinstatement. p. 200.
Release—when invalid. p. 71.
—— when shown to have been procured by fraud. p. 71.
Renewal—when action may be maintained on oral contract to renew. p. 626.
Suicide—when averment as to insufficient. p. 359.
—— when evidence insufficient to show. p. 467.
—— when plea of sustained. p. 359.
Waiver of proof of loss—when estopped to complain of insufficiency of proof. p. 467.

INTEREST.

Advances by partner—when interest not allowed on. p. 53.
Usury, see USURY.

INTERPLEADER.

Issues—what improper in bill for. p. 441.

INTERURBAN RAILROAD.

Contributory negligence—when evidence insufficient to show on part of pedestrian. p. 457.
Franchise—when ordinance grants use of street for. p. 352.

INTOXICATING LIQUORS.

See DRAMSHOPS.

JUDGMENT.

Appeal—what is effect of final judgment on. p. 600.
Bill to restrain enforcement—what is venue of. p. 395.
—— what must show as based on fraud. p. 395.
—— when defective. p. 395.
—— when injunction denied. p. 395.
—— when lies. p. 395.
Confession—when bill to restrain enforcement of execution, defective. p. 395.
—— when entry of under power of attorney after bankruptcy of judgment debtor, fraudulent. p. 451.
—— when may be vacated after expiration of term. p. 210.
—— when power of attorney to confess judgment on award of arbitrators invalid. p. 210.
—— when procuring of entry of fraudulent. p. 451.
—— when suit dismissed on vacation of void judgment. p. 210.
Default—when affidavit to set aside insufficient. pp. 116, 601.
—— when affidavit to set aside insufficiently shows right of set-off. p. 116.
—— when not vacated to let in plea of set-off. p. 116.
—— when sufficient in form. p. 627.
Default of codefendant—when defendant may not object to. p. 260.
Equitable relief—when not granted to set aside judgment for want of proper service of process. p. 71.
Form—what is proper form of judgment for defendant. p. 122.
Fraud in entry—when equity has jurisdiction to inquire into. p. 451.
Joint—when can be rendered only against specified guarantors. p. 108.
Joint defendants—what is effect where judgment fraudulently entered as to one. p. 451.
Joint wrongdoers—when joint judgment void as to both. p. 612.
Mechanic's lien—when proper in form. p. 260.

Motion to vacate—when in time. p. 395.
Record—when clerk has not authority to amend. p. 627.
Res judicata—when judgment on appeal is. p. 600.

JUSTICES OF THE PEACE.

Appeal—when copy may be substituted for lost written complaint on appeal. p. 643.
Pleadings—when statements of counsel substitute for. p. 496.

LANDLORD AND TENANT.

Action for rent—what damages may be set off. p. 368.
—— what evidence inadmissible under plea of set-off. p. 368.
Crop—presumption of title when mortgaged by landlord. p. 315.
Eviction—what constitutes. p. 368.
—— what does not constitute. p. 368.
Renting on shares—when landlord has title to crop. p. 315.
Repairs—when presumed that lessee had object in requiring lessor, by terms of lease, to repair stairway. p. 96.
Sand—when instruction on right of tenant to remove erroneous. p. 368.
—— when tenant liable for removal of. p. 368.
Title of landlord—when evidence as to want of, inadmissible. p. 368.
Wife of lessee—when entitled to use stairway. p. 96.
—— when landlord liable to, for personal injuries due to defective stairway. p. 96.

LICENSES.

Cities—when have power to impose fee for maintenance of telegraph poles. p. 218.
Fee—when annual fee for maintenance of poles constitutes license fee. p. 218.
—— when fee imposed on telegraph company not unreasonable. p. 218.
Reasonableness of fee—when evidence of amount of business done admissible. p. 218.

LIENS.

Attorneys, see ATTORNEYS.
Labor on chattels—when lien for exists. p. 166.
—— when waived. p. 166.

LIMITATION OF ACTIONS.

Action on note—when statute commences to run. p. 42.
Amended pleading—when pleading may be amended after running of statute. p. 96.
Amendment—when merely statement of original cause of action. p. 96.

Amendment—when not barred where original declaration states good cause of action. p. 96.
Drainage ditch—when remedy for defective condition of drainage ditch barred. p. 514.
—— when remedy for failure to keep in repair not barred by statute of limitations. p. 514.
Pleading—when new cause of action cannot be set up by amended declaration. p. 96.

MANDAMUS.

Dedication—when statutory approval of plat enforced. p. 86.
Drainage ditch—when statute does not run against remedying of defective condition. p. 514.
Limitation of actions—when action to compel drainage commissioners, to remedy defective condition of ditch, approved. p. 514.
Moot case—when judgment not reversed because. p. 595.
Right to—necessity for clear legal right. p. 514.
Title to office—how may not be tried. p. 621.

MARRIAGE.

Divorced person—what does not constitute prima facie case of invalidity. p. 584.

MASTER AND SERVANT.

Assumed risk—what risk not assumed. p. 247.
—— when defense of unavailable. p. 305.
Climbing poles—when negligence in failure to furnish spikes instead of spurs shown. p. 431.
Common-law liability—when liable notwithstanding obviousness of danger to employee. p. 431.
Contracts—when employer not estopped to enjoin violation of contract not to engage in same business. p. 157.
Contributory negligence—when standing between cars in train question for jury. p. 247.
Crossing track—when verdict for plaintiff against weight of evidence. p. 528.
Custom—when refusal of evidence as to, not erroneous. p. 431.
Cutting off coaches—when negligence question for jury. p. 247.
Federal Employers' Liability, see FEDERAL EMPLOYERS' LIABILITY ACT.
Garage proprietor—when not servant. p. 612.
Inspection—when instruction as to duty properly refused. p. 431.
Instruction—when erroneous as evading province of jury. p. 431.
—— when properly refused on circumstantial evidence. p. 431.
Pushing cars—when evidence sufficient to show undue violence. p. 247.

Relationship—when exists. p. 612.
Safety Appliance Act—when noncompliance with, constitutes proximate cause. p. 305.
Spurs—when providing of instead of spikes for climbing telephone poles negligence. p. 431.
State law—when recovery may not be had under, in action under Federal Act. p. 75.
Switching operations—when car inspector does not assume risk of being struck by cars during. p. 247.
Value of services—when admission of evidence as to harmless. p. 166.
Variance—when defendant not estopped to raise question. p. 75.
Workmen's compensation, see WORKMEN'S COMPENSATION.

MECHANIC'S LIEN.

Act—how construed. p. 639.
Apportionment of amount due—when failure to apportion against various owners may not be raised on appeal. p. 260.
Decree—when not objectionable because ordering building owned by several defendants sold as a whole. p. 260.
Judgment—when proper in form. p. 260.
Labor on chattels—when lien for waived. p. 166.
Liability of owner—when defendant failing to assert fact of, bound. p. 260.
Notice—when insufficient. p. 639.

MINES AND MINERALS.

Sand—when instruction on right of tenant to remove erroneous. p. 368.
—— when tenant liable for removal of. p. 368.

MORTGAGES.

Brokers—when evidence as to want of license inadmissible. p. 42.
Copy—when inadmissible. p. 483.
Crops—what does not constitute severance from realty. p. 315.
—— what is extent to which may be conveyed to mortgagee. p. 315.
—— when covered by mortgage on land. p. 315.
—— when mortgagor entitled to. p. 315.
Deed—when evidence establishes character as conveyance and not as a mortgage. p. 320.
Delay in recording—when defense available to indorser of note. p. 409.
Grantor—when not estopped to claim that deed was not given as a mortgage. p. 320.
Receiver—what is extent of receiver's interest in property. p. 315.

NAVIGABLE WATERS.

Piles maintained in violation of law—liability of person destroying. p. 496.

NEGLIGENCE.

Act of God—when recovery may be had for injury caused by. p. 347.
Children—what degree of care required not to injure. p. 184.
—— what degree of care required of. p. 184.
—— when contributory negligence in handling live wire for jury. p. 184.
—— when contributory negligence question for jury. p. 184.
—— when knowledge of danger not presumed on part of boy. p. 184.
Contributory—when immaterial. p. 457.
—— when person not bound to anticipate negligence of another. p. 247.
Degree of care—when instruction incorrect. p. 487.
Disposition of horse—when admissible on question of contributory negligence of rider. p. 324.
Duty—necessity for allegation of. p. 96.
—— when insufficiency alleged. p. 96.
Instructions—when properly modified as to proximate cause. p. 131.
Ordinary care—when question of law. p. 159.
Question for jury—when wilful or wanton negligence is. p. 457.
Question of law—when is. pp. 159, 347.
Trespassers—when person trespassing on land of another not trespasser as to defendant. p. 184.
Wilful or wanton—what constitutes. p. 457.

NEGOTIABLE INSTRUMENTS.

Assumpsit—when recovery may be had on common counts. p. 149.
Consideration—when sufficient to find. p. 385.
—— when supported by. p. 385.
Depreciated currency—what is measure of recovery in action on check payable in. p. 22.
Foreign currency—what is measure of recovery in action on check payable in. p. 22.
Fraud—when burden on defendant to show. p. 385.
—— when evidence insufficient to show. p. 385.
Indorser—what is nature of liability of. p. 409.
—— when delay in recording trust deed securing note is defense available to. p. 409.
—— when signer liable as. p. 409.
Limitation of action—when time begins to run. p. 42.
Order—when not negotiable. p. 591.
Payment—when note of third person conditional payment. p. 42.

Propositions of law—when properly refused as assuming facts. p. 385.
Release of joint makers—when evidence shows knowledge of payee. p. 51.
—— when extension of time results in. p. 51.
Variance—when exists between special count on note and proof. p. 149.

NEW TRIAL.

Affidavit—when insufficient. p. 646.
Evidence—when proper because against. p. 351.
Newly discovered evidence—how motion on ground of should be supported. p. 208.
—— when motion on ground of, properly denied. p. 351.
Surprise—when affidavit insufficient. p. 610.
—— when not granted on ground of. p. 556.

OFFICERS.

Former school treasurer—when estopped to claim irregularity in form of record of meeting. p. 621.
Meeting—when officer estopped to claim defects in minutes of. p. 621.

PARLIAMENTARY LAW.

Measure returned with veto—what is proper action by legislative body. p. 254.
Veto—when measure adopted over. p. 254.
Vetoed measure—what constitutes a reconsideration of. p. 254.
—— what is proper action after adoption of motion to reconsider. p. 254.

PARTIES.

Dismissal—when failure to amend by striking out name of party dismissed not ground for reversal. p. 108.
Equity—when court may on its own initiative require proper parties to be brought in. p. 273.
Substitution—when does not constitute new cause of action. p. 48.

PARTNERSHIP.

Advances—when to be regarded as firm indebtedness. p. 53.
Advances by partner—when interest not allowed on. p. 53.
Formation—when evidence insufficient to show. p. 149.

PAYMENT.

Application—when proper. p. 42.
Failure to demand—when does not bar recovery. p. 501.
Note—when evidence insufficient to establish that note given in payment was a forgery. p. 118.
—— when giving of, for pre-existing indebtedness constitutes. p. 118.
—— when note of to third person a conditional payment. p. 42.

PENALTIES.

Poor farm—when defendant may not be sentenced to, to work out. p. 531.

PLATS.

See DEDICATION.

PLEADING.

Affidavit of merits—when defendant confined to defenses set up in. p. 125.
—— when insufficient. p. 6.
Amended—when refusal to allow filing of not abuse of discretion. p. 6.
Demurrer—when filing of, not compliance with order requiring pleading to declaration. p. 15.
Election between counts—when complainant may not be required to make. p. 457.
Failure to deny—when effective as admission. p. 368.
Formal plea—when absence of cured by verdict. p. 464.
—— when failure to file cured by appearance. p. 464.
General issue—when parol evidence inadmissible under. p. 409.
Issues—when case treated as if oral issues joined. p. 280.
—— when failure to join in writing waived. p. 368.
—— when formed. p. 108.
—— when oral issue formed by parties voluntarily going to trial. p. 108.
Plea of set-off—what is nature of. p. 368.
Plea to jurisdiction—what is effect of absence of. p. 280.
—— when insufficient. p. 280.
—— when invalid. p. 280.
—— when not waived. p. 280.
Special plea—when demurrable as presenting partial defense. p. 409.
—— when demurrable as presenting question covered by general issue. p. 409.
—— when insufficient. p. 409.

Statute of limitations—when amendment merely a restatement of original cause of action. p. 96.
—— when amendment proper after running of statute. p. 96.
—— when new cause of action cannot be set up by amended declaration. p. 96.
Suicide—when averment as to, insufficient. p. 359.
—— when plea of, sustained. p. 359.
Variance—when defendant not estopped to raise question. p. 75.
—— when immaterial. p. 1.
—— when shown between special count on note and proof. p. 149.
—— when waived. p. 166.
Verdict—when absence of formal plea cured by. p. 464.
—— when defect or omission cured by. pp. 96, 100.
—— when defective and ambiguous allegation cured after. p. 305.
Videlicet—when averment laid under need not be exactly proved. p. 151.

PRINCIPAL AND AGENT.

Accounting—when burden of proof on agent on bill by principal. p. 1.
Authority of agent—when principal estopped to repudiate. p. 17.
Good faith—what degree of, required in dealings between. p. 1.
Relation—when exists. p. 280.
Settlement between—when set aside. p. 1.

PROCESS.

Defect—how taken advantage of. p. 549.
Laches—what constitutes in failing to question legality of service. p. 71.
Mailed—when presumed to have been received. p. 71.
Sheriff's return—when insufficiency of not considered on appeal. p. 116.
Summons—when void owing to ambiguity of return date. p. 549.

PROSECUTION.

Inmate—when evidence justifies conviction as. p. 68.

QUO WARRANTO.

Judgment of ouster—when proper. p. 479.
Pleadings—what defendant must allege. p. 479.
—— what rules govern. p. 479.

RAILROADS.

Racking train over crossings—when negligence when no warning given. p. 289.

Backing train over crossings—when negligence where speed excessive. p. 289.
Backing train without lights—when negligence. p. 289.
Dedication—when dedication of way over, not established. p. 331.
License—what duty owed on right of way. p. 331.
Ordinances—when persons crossing track may rely upon obedience of. p. 289.
Pleading—when defect in, cured by verdict. p. 100.
Prescriptive right over—when established. p. 331.
Streets—what is not an admission of existence of street over railroad right of way. p. 331.
—— when evidence insufficient to show existence of right of way over. p. 331.

RECEIVERS.

Appointment—when proper pendente lite. p. 38.
—— when Superior Court has constitutional jurisdiction. p. 38.
—— when within jurisdiction of court. p. 38.
Appointment pendente lite—when proper. p. 38.
Bond—when necessary from receiver pendente lite. p. 38.
Mortgaged property—what is interest of receiver. p. 315.

RECORD.

Clerk—when has no authority to amend. p. 627.

REFERENCE.

Report—when master may report all stipulations and agreements made orally parties. p. 260.

RELEASE.

Fraud—when secured by. p. 71.

ROADS AND BRIDGES.

Animals—when allowing to run at large in, constitutes negligence. p. 339.
Contributory negligence—when instruction on, properly modified. p. 339.
Costs—when highway commissioners not personally liable for. p. 238.
Disposition of horse—when inadmissible on question of contributory negligence of rider. p. 324.
Leaving wagon in street—when instruction misleading. p. 324.
Obstruction—when instruction misleading. p. 324.
—— when question for jury. p. 324.

Petition to lay out new road—when contains sufficient number of signatures. p. 238.
—— when description sufficient. p. 238.
—— when may be considered with petition to vacate old road. p. 238.
—— when question of vacating old road need not be included. p. 238.
—— when shows qualifications of petitioners. p. 238.
—— when sufficiently shows names of owners of land passed over. p. 238.
Prescription—when way by, over railroad right of way, established. p. 331.
Railroad right of way—what does not constitute admission as to existence of street over. p. 331.
—— when evidence insufficient to show existence of highway over. p. 331.
Right of way—when ordinance giving on certain streets valid. p. 392.
Vacation of old road—when need not be included in petition to lay out new road. p. 238.
—— when petition for may be considered with petition to lay out new road. p. 238.
Width—when extent of improvement question for local authority. p. 324.

SAFETY APPLIANCE ACT.

Assumed risk—when defense of unavailable. p. 305.
Proximate cause—when noncompliance with, constitutes. p. 305.

SALES.

Abandonment of contract—when seller may sue on quantum meruit. p. 179.
Acceptance—when evidence insufficient to show. p. 65.
—— when instruction erroneous. p. 65.
Contracts—when order and acceptance constitute. p. 65.
Instruction—when erroneous. p. 65.
Storage subject to order of purchaser—when right of seller to recover purchase price not affected by. p. 179.
Warranty—when conduct of buyer insufficient to show waiver of implied warranty of quality. p. 65.
—— when implied. p. 65.
—— when instruction erroneous as excluding elements of implied warranty. p. 65.
—— when instruction erroneous as to waiver of implied warranty. p. 65.

SCHOOLS AND SCHOOL DISTRICTS.

County superintendent—when duty of to give certificate to appointed school teacher. p. 621.
Former treasurer—when estopped to claim irregularity in form of record of meeting. p. 621.
High school—when order directing school officers to approve, proper. p. 251.
—— when parent entitled to have tuition of child in another district paid. p. 251.
Meetings—when former officer estopped to claim defects in minutes of meeting. p. 621.
Treasurer—what power school trustees have to remove. p. 621.
—— when bond properly approved. p. 621.
—— when entitled to funds. p. 621.

SET-OFF AND RECOUPMENT.

Action for rent—what damages may be set off. p. 368.
Claim for services under implied contract—when not ground for set-off. p. 6.
Default judgment—when affidavit to set aside insufficiently discloses right to set-off. p. 116.
Evidence—what inadmissible under plea of set-off. p. 368.
—— when insufficient to establish right to set-off. p. 149.
—— when sufficient to sustain verdict. p. 465.
Plea of set-off—what is nature of. p. 368.
Recoupment—what is. p. 277.
—— when defendant in action by administrator may recoup expenses. p. 277.
Set-off—what is proper matter for. p. 6.
Striking statement of set-off—when error waived. p. 6.

SIDEWALKS.

See CITIES AND VILLAGES.

STATUTES.

Construction—what presumed as to legislative intent. p. 617.

STREET RAILROADS.

Auto-truck—when evidence shows contributory negligence of driver. p. 392.
—— when evidence shows lack of negligence on part of defendant in striking. p. 392.
Collision with vehicle—when company not liable where caused by fall of horse. p. 225.

Contributory negligence—when evidence insufficient to show on part of pedestrian. p. 457.
—— when instruction on, correct. p. 392.
Crossings—what degree of care required in approaching. p. 225.
Negligence of motorman—when evidence sufficient to show. p. 457.
Passing in rear of car—when contributory negligence question for jury. p. 487.
Pedestrian crossing track—when sharp lookout must be maintained by. p. 487.
Speed—when question of excessiveness for jury. p. 225.
Street crossings—what degree of care required in approaching. p. 457.
Traffic ordinances—when admissible in action for damages for collision. p. 392.

SUICIDE.

Declarations of intention to commit—when inadmissible in action under Civil Damage Act. p. 193.
Evidence—when insufficient to show. p. 467.

TELEGRAPH COMPANIES.

Licenses—when city has power to impose fee for maintenance of poles. p. 218.
Poles—when fee imposed for maintenance, a license fee and not a rental. p. 218.
—— when license fee not unreasonable. p. 218.

TELEPHONES.

Mistake—how affecting minds of contracting parties. p. 20.

TORTS.

Joint judgment—when void as to both wrongdoers. p. 612.
Piles in navigable stream—liability of person destroying although maintained in violation of law. p. 496.

TOWNSHIPS.

Treasurer—what power school trustees have to remove. p. 621.

TRESPASS.

Land not owned by defendant—when person trespassing on, not trespasser as to defendant. p. 184.

TRIAL.

Argument of counsel—when improper. p. 166.
—— when not ground for reversal. p. 9.
—— when proper. p. 9.
—— when statement of belief by, constitutes harmless error. p. 9.
Directed verdict—when not granted. p. 424.
Issue—when oral issue formed by parties voluntarily going to trial. p. 108.
—— when treated as if oral issues joined. p. 280.
Misconduct of counsel—when ground for reversal. p. 324.
Objection—when insufficient as to form of questions. p. 131.
—— when not sufficiently specific. p. 225.
Objection to evidence—when must be specific. p. 556.
Offer of proof—when insufficient. p. 118.
Peremptory instruction—when failure to give in writing not ground for reversal. p. 63.
Propositions of law—when correct, on duties of drainage commissioners. p. 514.
Question—when party not required to show facts sought to be proved by answer. p. 202.
Questions for court—when character of relationship as master and servant or bailor and bailee is. p. 612.
Remarks of counsel—when ground for reversal. p. 487.
Statement of court—when improper as invading province of jury. p. 644.
Verdict—when court may not reconcile self-contradictory verdict with supposed facts. p. 233.

TROVER AND CONVERSION.

Administrator—when maintain for conversion of certificate cashed by defendant during deceased's lifetime. p. 588.
Conversion of certificate of deposit—when burden on plaintiff to show that assignment was made to defendant by intestate when mentally incompetent. p. 588.

TRUSTS.

Accounting—who are proper parties to bill for, against trustee upon death of beneficiary. p. 273.

USURY.

Burden of proof—when on debtor. p. 42.
Defense—when not. p. 42.
Evidence—when insufficient to show. p. 42.
Pleaded—how. p. 609.
Pleading—when insufficiently pleaded. p. 609.

VENDORS AND VENDEES.

Contract to convey—what is measure of damages for breach. p. 320.
Contract to repurchase unsold land from vendee—what is measure of damages for breach. p. 125.
Contracts—when evidence shows that vendor unable to perform at date fixed for performance. p. 244.
—— when meeting of minds absent. p. 136.
False representations—when evidence shows. p. 29.
—— when evidence shows as to title. p. 483.
Fraud—what is measure of damages. p. 483.
Fraudulent representations—what are not. p. 29.
Offer and ability to perform—when evidence shows on part of purchaser. p. 244.
Property conveyed under oral agreement—when assumpsit lies to recover value of. p. 320.
Rescission of contract—when purchaser may rescind. p. 244.

VENUE.

Bill to restrain judgment—what is proper venue of. p. 395.
Change—what is effect of proper application for. p. 137.
—— when grant of imperative. p. 137.
—— when petition filed in apt time. p. 137.
—— when refusal ground for reversal. p. 137.
—— who is not a defendant who must consent to change of. p. 137.

VERDICTS.

Amount—when neither party may complain of. p. 208.
Contradictory—when court may not reconcile with supposed facts. p. 233.
Excessive—when $1,200 not. p. 225.
—— when $2,000 not. p. 119.
—— when $3,000 not. pp. 9, 131, 431.
—— when $7,000 not. pp. 289, 556.
—— when $7,200 not. p. 247.
—— when $8,000 not. p. 305.
Form—when instruction proper. p. 131.

WILLS.

Expectant estate—when may be assigned. p. 583.
Proceeds of assigned policy—when disposition by will ineffective. p. 441.

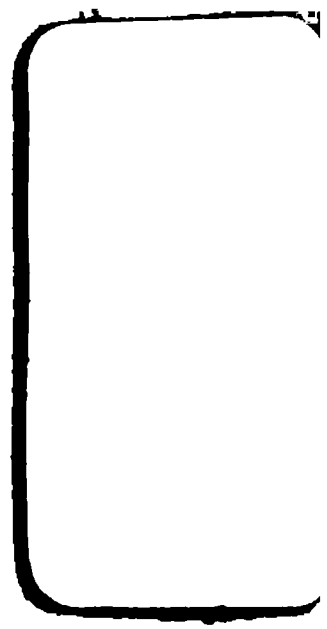
WITNESSES.

Attorney—right of to be a witness. p. 483.
—— when may testify as to conversation with client. p. 483.

Competency—when party competent with reference to transactions involving decedent. p. 277.
Credibility—when instruction on, harmless. p. 556.
—— who proper judge of. p. 470.
Cross-examination—what proper for purpose of corroboration. p. 624.
—— when denial proper. p. 426.
—— when improper. p. 641.
Impeachment—when proper. p. 301.
Number of—when instruction on preponderance of evidence ignoring question of, objectionable. p. 9.
Objection—when insufficient to form of question. p. 131.
Questions—when party not bound to state facts sought to be proved by answer. p. 202.

WORDS AND PHRASES.

"*Intoxicating liquor*"—how defined. p. 602.
"*Servant*"—how defined. p. 612.

WORKMEN'S COMPENSATION.

Action at common law—what plaintiff must aver and prove. p. 431.
—— when damages not excessive. p. 431.
—— when instruction correct. p. 431.
—— when negligence must be proved. p. 431.
Action tried as at common law—when party may not complain on appeal. p. 403.
Appeals—what bill of exceptions must contain to review ruling to quash certiorari. p. 647.
Assumpsit—when evidence as to liability properly excluded in action on award. p. 45.
—— when proper remedy for recovery of award. p. 45.
Award—when evidence as to liability properly excluded in action on award. p. 45.
—— when sufficient when signed by two of three arbitrators. p. 45.
County court—when has jurisdiction in action of assumpsit on award. p. 45.
Negligence—when employer liable in action at common law notwithstanding obviousness of danger. p. 431.
Rejection by employer—what is effect of. p. 431.